Stern Produce Company, Inc. *and* United Food *and* Commercial Workers Union, Local 99. Cases 28–CA–163215, 28–CA–166351, and 28–CA–168680

July 31, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On December 14, 2017, Administrative Law Judge Lisa D. Thompson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. In addition, the General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.[3]

The judge found, and we agree, that the Respondent committed multiple and serious violations of the National Labor Relations Act. We disagree, however, with her recommendation that the Board issue a remedial bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Although the extent and severity of the Respondent's unfair labor practices warrant consideration of this remedy, more than 3-1/2 years have passed since they were committed. Moreover, the Respondent's "hallmark" violations were witnessed by only three employees, and there is no evidence that they were disseminated beyond these three. These facts and circumstances raise substantial doubt as to the enforceability of a *Gissel* bargaining order. Consistent with our recent decision in *Sysco Grand Rapids, LLC*, 367 NLRB No. 111 (2019), we believe the wiser course is to order certain extraordinary remedies, including special union-access remedies, to dissipate the effects of the Respondent's violations, following which, if the Union wishes to proceed, the employees may exercise their right of free choice in a Board-conducted, secret ballot election.

I. OVERVIEW

This consolidated proceeding arose from an organizing drive by United Food and Commercial Workers Union, Local 99 (the Union), conducted among drivers and warehouse employees at the Respondent's wholesale distribution and delivery facility in Phoenix, Arizona. Having obtained signed authorization cards from a majority of the Respondent's drivers and warehouse employees, the Union filed a petition for a representation election on October 14, 2015.[4] Pursuant to a Stipulated Election Agreement, an election was scheduled for November 5. From October 22 to November 3, the Respondent's labor consultants, Ricardo Pasalagua and Miko Penn, met with employees in the petitioned-for unit to discuss the upcoming election. The Respondent's owner, William Stern, attended and participated in some of these meetings.

On November 3, the Union filed an unfair labor practice charge in Case 28–CA–163215, alleging that the Respondent had committed numerous violations of the Act during these meetings. Later that day, the Regional Director postponed the election pending the outcome of an investigation into the Union's unfair labor practice charge.

On November 4, Pasalagua read the unfair labor practice charge to a group of employees in the petitioned-for unit and told them that the Union's filing of the charge caused the election to be cancelled. Through mid-January 2016, Pasalagua met with employees to discuss the charge and the Region's subsequent request for certain materials from the Respondent. Thereafter, the Union filed a second charge in Case 28–CA–166351, amended its second charge, and filed a third charge in Case 28–CA–168680, alleging that the Respondent had committed additional violations of the Act. On July 19, 2016, the Regional Director issued a consolidated complaint, alleging that the Respondent had committed numerous unfair labor practices.

The judge dismissed allegations that the Respondent violated the Act by interrogating employee Eduardo Mancera, creating the impression of surveillance by telling employees Jose Ruiz and Roberto Rosas that a majority of employees no longer supported the Union and that it was supported by only a small group of employees, threatening employees with wage loss, telling employees

[1] The Respondent also filed a motion to reopen the record, to which the General Counsel filed a timely opposition, and the Respondent filed a reply. The motion is addressed at fn. 13, infra.

[2] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We have amended the judge's conclusions of law consistent with our findings herein. We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

[4] All dates hereafter are in 2015 unless otherwise noted.

to not pay attention to the Union and that the Union would not be able to do anything for them because the Respondent was the one with the last word, and discouraging employees from participating in the Board's investigation by telling them that the Respondent could not help them with their work orders because it had to continue answering Board charges. We adopt the judge's dismissal of these allegations.[5]

The judge found, however, that the Respondent committed multiple violations of Section 8(a)(1) before the scheduled election date. These violations included interrogating employees about their union sympathies; making various threats, including "hallmark" threats of job loss, layoffs, and facility closure; creating the impression that employees' union activities were under surveillance; promising to improve employees' working conditions, salaries, insurance, and positions if employees voted against union representation; and promising that owner, William Stern, would fix a workers' compensation problem.[6] The judge additionally found that after the election was postponed, the Respondent interfered with the Board's investigation of the unfair labor practice charges, also in violation of Section 8(a)(1). We adopt these findings for the reasons stated by the judge.[7] Further, in the absence of exceptions, we adopt the judge's findings that the Respondent violated Section 8(a)(1) by impliedly promising employee Eduardo Mancera and others that the Respondent would provide drivers with jackets and other unspecified benefits if employees voted against the Union, and by promising to promote an employee if the employee stopped engaging in union activity.[8] As explained below, however, we reverse the judge's findings that the Respondent violated the Act by its remarks about strikes and lockouts and about changes in employees' ability to deal directly with the Respondent's owner if employees selected the Union to represent them.

Finally, the judge's recommended Order included a notice-reading remedy and a *Gissel* bargaining order, and the judge declined to grant the General Counsel's request for special union-access remedies. We do not adopt the judge's bargaining order remedy. As explained below, however, we agree that a notice-reading remedy is warranted, and we shall additionally order certain special union-access remedies. We will also substitute a broad cease-and-desist order for the judge's recommended narrow order.

II. ALLEGED THREAT THAT A STRIKE OR LOCKOUT WAS INEVITABLE

The judge found, among other things, that the Respondent violated Section 8(a)(1) by threatening its employees that a strike or lockout was inevitable if they selected the Union as their collective-bargaining representative and the

[5] In dismissing the allegation that the Respondent discouraged participation in the Board's investigation by telling employees that it could not help them with work orders while having to answer Board charges, the judge observed that the General Counsel "failed to establish how these statements discouraged or hindered [employee Eduardo] Mancera or others from participating in the Board's investigation of the Union's ULP charges." We do not rely on this observation, which appears to apply a subjective legal standard to the Respondent's statements. The Board applies an objective standard in these circumstances. See, e.g., *Management Consulting, Inc. (Mancon)*, 349 NLRB 249, 250 fn. 6 (2007). In any event, we agree with the judge that this allegation lacks record support and should therefore be dismissed.

Member McFerran joins her colleagues in dismissing the allegation that the Respondent violated the Act by interrogating employee Mancera. In doing so, though, she notes that there were two allegedly unlawful encounters. There were no exceptions filed to the dismissal based on the first meeting, and the second was not an interrogation for the reasons given by the judge.

[6] Only one unlawful statement—an implied threat of loss of benefits—was made to a large group of employees (36 out of 65 employees in the petitioned-for unit); most of the remaining statements were made during small-group meetings, and the record does not establish how many employees heard them; and only three employees heard the "hallmark" threats and there is no evidence that those threats were disseminated beyond those three.

[7] In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by interrogating its employees about their union sympathies, we rely on the judge's finding that the questioning was coercive under all the circumstances. See *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel Employees & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). We do not pass on the judge's additional finding that asking whether employees would vote for the Union was inherently coercive.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by threatening that it would go bankrupt if employees unionized, we note that the credited testimony supporting this finding was furnished by Jose Pacheco, not Juan Juarez as stated by the judge.

The Respondent excepted to the judge's conclusions that the Respondent violated Sec. 8(a)(1) by creating the impression of surveillance when Ricardo Pasalagua accused Eduardo Mancera of riling up employees and then declined to respond to Mancera's request for the source of Pasalagua's information, and when Pasalagua suggested that he knew employees were participating in the Board's investigation, but it presented no argument in its brief in support of either exception. Accordingly, pursuant to Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations, these exceptions may be disregarded, and we find it appropriate to do so here. See, e.g., *Neises Construction Corp.*, 365 NLRB No. 129, slip op. at 1 fn. 5 (2017).

[8] We find it unnecessary to pass on the judge's dismissal of the allegation that, by the same statement, the Respondent also threatened loss of a promotional opportunity, as an additional violation finding would not materially affect the remedy.

Member McFerran joins her colleagues in adopting the judge's finding of this violation but would also reverse the judge's dismissal of the allegation that the statement further threatened the loss of a promotional opportunity. The judge found that Pasalagua unlawfully promised employee Mancera that the Respondent was considering him for a supervisor position and that he should "calm down" from "riling up" employees. The promise of benefit and threat of reprisals are two outcomes from the same statement: if Mancera "calmed down" from "riling up" employees, he would be given a promotion to a supervisory position. But if he did not, he would be denied such a position.

Union rejected the Respondent's bargaining demands. We disagree with the judge's finding.

The record shows that during one of the meetings with employees to discuss the upcoming election, labor consultant Miko Penn made the following remarks:

> You also have the option to strike. If a final offer is rejected, a strike vote will be taken. Most of you don't want to go on strike. But if you do, you have a right to vote for that. Or, the Employer, Billy [Stern], as a pressure tactic to slap some sense into the Union, and they can lock you out. That is Billy's leverage. He says, "Look these negotiations are not going anywhere. We are not coming to an agreement." You are not going on strike or he finds out that you may be going on strike next week. And in order to protect his own business, he can lock the door, on all of you. That is absolutely legal. That is his pressure tactic that he has to make sure the Union agrees to his terms.

The judge found that these remarks were unlawful because they were "devoid of objective facts based upon specific past strike experiences" and "conveyed to employees that strikes are inevitable[.]" Contrary to the judge and our dissenting colleague, we find these remarks were not unlawful.

Absent accompanying threats or promises of benefit, an employer does not violate the Act when it shares with employees a correct statement of the law. See, e.g., *Eagle Comtronics, Inc.*, 263 NLRB 515, 515–516 (1982) (finding that employer did not violate the Act by "truthfully informing employees that they are subject to permanent replacement in the event of an economic strike"); *Drives, Inc.*, 172 NLRB 969, 970 (1968) (finding that employer's statements about the union's ability to call a strike and the risk of a strike if the union won the election did not violate the Act where the employer did not characterize a strike as inevitable), enfd. on other grounds 440 F.2d 354 (7th Cir. 1971), cert. denied 404 U.S. 912 (1971). Here, Penn accurately stated that employees had the right to strike if they rejected the Respondent's final offer in contract negotiations. Penn also accurately stated that the Respondent can "lock the door" on them (i.e., lock out its employees) in anticipation of a strike or in support of its bargaining position. See *American Ship Building Co. v. NLRB*, 380 U.S. 300, 310 (1965) (holding that employer's use of a lockout in support of its legitimate bargaining position is not "in any way inconsistent with the right to bargain collectively or with the right to strike"); *Highland Superstores, Inc.*, 314 NLRB 146, 146 (1994) (employer can lawfully lock out employees "in response to economic action by the union, provided that the employer's action is in support of a lawful bargaining position"). Penn's accurate statements of the law included no language suggesting a predetermination to force a strike or resort to a lockout and, therefore, were lawful.

Focusing narrowly on isolated statements within Penn's remarks, our dissenting colleague contends that Penn "[conveyed to] employees with certainty that they would be locked out (for reasons unrelated to economic necessities) if they chose union representation." This contention is not borne out by a fair reading of the entirety of what Penn said. Preliminarily, Penn explained that employees would have "the option to strike" if they were not satisfied with the Respondent's contract offer and that a decision to strike would depend on their vote. Penn then stated that Stern *could* "lock the door" in certain circumstances, not that he *would* do so. Thus, Penn's remarks interposed three contingencies between a choice to unionize and a lockout: (i) the possibility (not the inevitability) that employees might be dissatisfied with the Respondent's contract offer; (ii) the possibility (not the inevitability) that employees might vote to strike if they were dissatisfied with the offer; and (iii) the possibility (not the inevitability) that Stern might lock out employees as a pressure tactic in certain circumstances.[9] In these circumstances, we find that Penn did not convey that a strike or lockout would inevitably result from unionization.[10]

[9] We do not dispute the dissent's contention that it is possible, depending on the facts of a specific case, to convey that a strike or lockout is inevitable without using the words "will" or "would." In the circumstances presented here, however, Penn's remarks did not convey inevitability, as explained above. And because they did not do so, the Respondent was under no obligation to mitigate Penn's remarks by providing assurances that strikes are not inevitable, as the dissent mistakenly suggests.

[10] Contrary to the dissent's contention, neither *Harrison Steel Castings*, 293 NLRB 1158 (1989), nor *Neo-Life Co. of America*, 273 NLRB 72 (1984), compel a finding of a violation here. In *Harrison Steel Castings*, the employer invoked the "ever-present possibility of a strike" and subsequent job loss resulting from a decision to unionize. 293 NLRB at 1159. In other words, the employer in that case drew a straight line from unionization to the looming prospect of a strike as an "ever-present possibility" to job loss. It did not, as here, make a strike contingent on multiple intervening events between the decision to unionize and a strike or lockout. In *Neo-Life Co. of America*, the employer's executive vice president told employees that if they voted for the union, the employer "would not want to bargain," that it "would not have to sign a contract," and that if there were no contract a strike would follow and "scabs" would come in, and the Board found that this constituted a threat to force a strike by bargaining in bad faith. 273 NLRB at 72. No such facts are presented here. Similarly unavailing are the dissent's citations to other cases involving statements clearly conveying that unionization will inevitably lead to a strike, lockout, or other adverse consequences. See *Systems West LLC*, 342 NLRB 851, 851–853 (2004) (employer predicted that unionization would limit employees' ability to be hired for jobs in their work area); *Schaumburg Hyundai, Inc.*, 318 NLRB 449, 450 (1995) (employer predicted, without objective facts, that unionization would result in lower wages and harsher working conditions); *Walker Color Graphics*, 227 NLRB 455, 466 (1976) (employer threatened to cease

Accordingly, we reverse the judge's finding that by Penn's remarks, the Respondent violated Section 8(a)(1).

III. ALLEGED THREAT OF LOSS OF BENEFIT

The judge found that the Respondent, by its consultant Ricardo Pasalagua, violated Section 8(a)(1) by threatening to withhold a benefit from employees if they selected the Union as their collective-bargaining representative. The judge based this finding on credited testimony that Pasalagua told Eduardo Mancera and other employees that if they chose the Union to represent them, they would no longer have direct dealings with the Respondent's owner and would have to wait until the Union negotiated with him. The judge found that although Pasalagua's remark was accurate, it was nevertheless unlawful because it reasonably conveyed an implied threat of loss of communication and followed other statements that violated Section 8(a)(1). Contrary to the judge, we find Pasalagua's remark was lawful.

In determining whether statements about the impact of unionization violate Section 8(a)(1), the Board considers the totality of the relevant circumstances. See *Gissel*, 395 U.S. at 589; *North Star Steel Co.*, 347 NLRB 1364, 1366 (2006). However, the Board will find "no threat, either explicit or implicit, in a statement that explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before." *Office Depot*, 330 NLRB 640, 642 (2000) (citing *Tri-Cast, Inc.*, 274 NLRB 377 (1985)).

Here, as the judge observed, Pasalagua accurately described the precise effect of unionization, conveying that employees would deal with the Respondent through the Union rather than directly with the Respondent's owner. The judge erred, however, in finding that this accurate description was rendered unlawful by the fact that it followed unlawful statements. The Board is generally "reluctant to convert otherwise lawful statements into unlawful threats simply because of the existence of other violations," *Children's Center for Behavioral Development*, 347 NLRB 35, 36 (2006), and we decline to do so here. Although the Board has, on occasion, found "ambiguous comments" unlawful "because of a pervasively coercive atmosphere," id. at 36-37, Pasalagua's statement was not ambiguous. His unambiguous message was that choosing to have a collective-bargaining representative would impact the manner in which employees would deal with the Respondent's owner, and such a statement is clearly lawful under longstanding precedent. Accordingly, we reverse the judge's 8(a)(1) finding and dismiss this complaint allegation.[11]

IV. THE JUDGE'S RECOMMENDED BARGAINING ORDER

Having found that the Respondent engaged in numerous and pervasive unfair labor practices, including hallmark violations involving threats of job loss, layoffs, and facility closure, and that the unfair labor practices continued over several months, the judge further found that the violations tainted the environment to such an extent that a *Gissel* bargaining order was warranted.

Given the extent and severity of the Respondent's unfair labor practices, we would normally consider issuing a bargaining order. However, over 3-1/2 years have elapsed between the Respondent's unfair labor practices and the issuance of our decision today. This delay creates a substantial risk that a *Gissel* bargaining order would prove unenforceable. See, e.g., *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1171–1172 (D.C. Cir. 1998) (4-year delay between unfair labor practices and Board decision in part obviated need for bargaining order). In similar circumstances but where (unlike here) an election had been held, the Board has found that employees' rights would be better served by proceeding directly to a second election rather than engendering further litigation and delay over the propriety of a bargaining order remedy. See *Sysco Grand Rapids*, 367 NLRB No. 111, slip op. at 2; *Smithfield Foods, Inc.*, 347 NLRB 1225, 1232–1233 (2006); *Audubon Regional Medical Center*, 331 NLRB 374, 377–378 (2000); *Comcast Cablevision of Philadelphia*, 328 NLRB 487, 487 (1999); *Cooper Industries*, 328 NLRB 145, 146 (1999), review denied sub nom. *Steelworkers v. NLRB*, 8 Fed.Appx. 610 (9th Cir. 2001). The same concerns about doubtful enforceability and litigation-related delay are present here. In addition, and contrary to our dissenting colleague, a reviewing court might find that the absence of evidence that the hallmark violations were disseminated beyond the few employees who were subjected to them also weighs against enforcement of a bargaining order. See *Stevens Creek Chrysler Jeep Dodge,* 357 NLRB 633, 637 (2011) (extent of dissemination, among other factors, considered in determining whether *Gissel* bargaining order is warranted), enfd. 498 Fed.Appx. 45 (D.C. Cir. 2012); *Desert Toyota*, 346 NLRB 118, 121–122 (2005) (no *Gissel* bargaining order where

operations if employees unionized); *Essex Wire*, 164 NLRB 319, 319–320 (1967) (in urging employees to ratify contract, employer stated that possible consequence of not ratifying included closing the plant and permanent loss of employees' jobs).

[11] In agreeing to reverse the judge's 8(a)(1) finding and to dismiss the allegation that Pasalagua unlawfully told Mancera that the employees would no longer have direct dealings with the Respondent's owner and would have to wait until the Union negotiated with him, Member McFerran notes, without passing on whether it was correctly decided, that the statement was not unlawful under *Tri-Cast, Inc.*, 274 NLRB 377 (1985), and declines at this time to revisit that decision.

hallmark violations did not impact a significant portion of the bargaining unit), petition for review denied 265 Fed.Appx. 547 (9th Cir. 2008).[12]

For these reasons, we decline to impose a *Gissel* bargaining order remedy.[13] We find, however, that certain special remedies are warranted in light of the Respondent's extensive and serious unfair labor practices, both in response to its employees' union organizational efforts and after the election was postponed. These additional remedies should serve to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices and to ensure that a fair election can be held should the Union choose to proceed to an election.

Specifically, we adopt the judge's notice-reading remedy, requiring the Respondent to have the attached notice read aloud, in English and Spanish, to the employees so that they "will fully perceive that the Respondent and its managers [and consultants] are bound by the requirements of the Act." *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), review denied 400 F.3d 920, 920, 930 (D.C. Cir. 2005). The Board has long held that the "public reading of the notice is an 'effective but moderate way to let in a warming wind of information and, more important, reassurance.'" *United States Service Industries*, 319 NLRB 231, 232 (1995) (quoting *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969)), enfd. 107 F.3d 923 (D.C. Cir. 1997). Reassurance to employees that their rights under the Act will not be violated by the Respondent is particularly important because the Respondent's owner, William Stern, not only hired the labor consultants who committed most of the violations but was personally and directly involved in some of the misconduct. See, e.g., *North Memorial Health Care*, 364 NLRB No. 61, slip op. at 1 (2016) (notice-reading appropriate in part due to participation of high-ranking responsible management officials in unfair labor practices), enfd. in relevant part 860 F.3d 639 (8th Cir. 2017). We shall accordingly order the Respondent, during the time the required notice is posted, to convene employees in the petitioned-for unit during working time at its Phoenix, Arizona facility, by shifts, departments, or otherwise, and have William Stern (or, if he is no longer the owner, a high-ranking management official), in the presence of Ricardo Pasalagua, Miko Penn, and a Board agent and an agent of the Union if the Region and/or the Union so desire, read the notice aloud to employees (with translation into Spanish), or, at the Respondent's option, permit a Board agent, in the presence of Stern, Pasalagua, and Penn, to read the notice to the employees. See *Bozzuto's, Inc.*, 365 NLRB No. 146, slip op. at 5 (2017).

In addition, we shall order remedies aimed at securing the Union "an opportunity to participate in [the] restoration and reassurance of employee rights by engaging in further organizational efforts . . . in an atmosphere free of further restraint and coercion." *United Dairy Farmers Cooperative Assn.*, 242 NLRB 1026, 1029 (1979), enfd. in relevant part 633 F.2d 1054 (3d Cir. 1980). We shall thus require the Respondent to grant the Union and its representatives reasonable access to the Respondent's bulletin boards and all other places where notices to employees are customarily posted, and shall further order the Respondent to supply the Union, on its request, the names and addresses of its current unit employees. See *Audubon Regional Medical Center*, 331 NLRB at 378. We shall additionally order the Respondent to give notice of, and equal time and facilities for the Union to respond to, any address made by the Respondent to its employees on the question of union representation. We impose these special access remedies in light of the significant and pervasive nature of the Respondent's unfair labor practices and the need to assure a free and fair election. See *Monfort of Colorado*, 298 NLRB 73, 86 (1990), enfd. in relevant part 965 F.2d 1538 (10th Cir. 1992); *United Dairy Farmers Cooperative Assn.*, 242 NLRB at 1029.

Finally, we find that the egregiousness of the Respondent's unfair labor practices warrants a broad order requiring the Respondent to cease and desist "in any other manner" from interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights. See *Hickmott Foods*, 242 NLRB 1357 (1979).

AMENDED CONCLUSIONS OF LAW

Delete paragraphs 7, 9, 16, and 17 of the judge's Conclusions of Law and renumber the remaining conclusions accordingly.

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[12] The dissent contends that our reliance, in part, on the absence of evidence that hallmark violations were disseminated demonstrates that we misunderstand the *Gissel* standard, but she herself acknowledges that extent of dissemination is one factor the Board considers in determining whether a Category II *Gissel* bargaining order is warranted. See, e.g., *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB at 637; *Garvey Marine, Inc.*, 328 NLRB 991, 993 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001).

[13] We share our colleague's strong commitment that our remedies should do as much as possible to eliminate the lingering effects of the Respondent's unfair labor practices. We simply disagree that in the circumstances of this case, as in comparable cases cited above, a remedial bargaining order is an essential or even advisable means of accomplishing that shared goal as soon as possible.

Because we have decided not to issue a *Gissel* bargaining order, the Respondent's motion to reopen the record to introduce evidence of changed circumstances since the unfair labor practices were committed is moot.

ORDER

The National Labor Relations Board orders that the Respondent, Stern Produce Company, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union membership, activities, sympathies, or support.

(b) Coercively interrogating employees about their participation in the National Labor Relations Board's investigation of unfair labor practice charges filed against the Respondent.

(c) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(d) Threatening employees with the sale of the Respondent's business if employees supported the Union.

(e) Threatening employees with the closure of their work facility if employees supported the Union.

(f) Threatening employees that the Respondent will declare bankruptcy if employees supported the Union.

(g) Threatening employees with loss of benefits, reduced work hours, and unspecified reprisals if employees supported the Union.

(h) Threatening that employees would be fined or jailed if they testified during the Board's investigation of unfair labor practice charges filed against the Respondent.

(i) Threatening employees that selecting a union representative would be futile.

(j) Promising employees increased wages, benefits, equipment, and other improved terms and conditions of employment to discourage employees from supporting the Union.

(k) Discouraging employees from testifying in the Board's investigation of unfair labor practice charges filed against the Respondent.

(l) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Phoenix, Arizona facility copies of the attached notice marked "Appendix"[14] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 29, 2015.

(b) Within 14 days after service by the Region, at its Phoenix, Arizona facility, hold a meeting or meetings, scheduled to ensure the widest possible attendance of unit employees, at which the attached notice marked "Appendix" is to be read to employees (with Spanish translation) by the Respondent's owner, William Stern (or, if he is no longer the owner, by a high-ranking responsible management official of the Respondent), in the presence of Ricardo Pasalagua, Miko Penn, and a Board agent and an agent of the Union if the Region and/or the Union so desire, or, at the Respondent's option, by a Board agent in the presence of Stern (or another high-ranking management official if Stern is no longer the owner), Pasalagua, Penn, and an agent of the Union if the Union so desires.

(c) Immediately on request of the Union, for a period of 2 years from the date on which the notice is posted or until the Regional Director has issued an appropriate certification following a free and fair election, whichever comes first, grant the Union and its representatives reasonable access to the Respondent's bulletin boards and all places where notices are customarily posted in its facility in Phoenix, Arizona.

(d) Supply the Union, on its request, with the full names and addresses of its current unit employees, updated every 6 months, for a period of 2 years or until a certification after a fair election.

(e) In the event that during a period of 2 years following the date on which the aforesaid notice is posted, or until the Regional Director has issued an appropriate certification following a free and fair election, whichever comes first, any supervisor or agent of the Respondent convenes any group of employees at the Respondent's facility in Phoenix, Arizona, and addresses them on the question of union representation, give the Union reasonable notice thereof and afford two union representatives a reasonable opportunity to be present at such meeting and, on request,

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

give one of them equal time and facilities to address the employees on the question of union representation.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 31, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting in part.

Although I join my colleagues in many of their findings today, I write separately to dissent on two issues. First, I agree with the judge's finding that the Respondent's statement that it would lock out employees in the event they chose union representation constitutes a threat in violation of Section 8(a)(1) of the Act. Second, considering the Respondent's egregious and wide-reaching violations of the Act, as well as the negative impact of those violations on the prospect of conducting a fair election, I would issue a *Gissel*[1] bargaining order remedy.

I.

There is no dispute about what the Respondent's official told employees would certainly happen if they chose to be represented by the Union. The Respondent's labor relations consultant, Miko Penn, told approximately 36 employees at a mandatory meeting that:

> You also have the option to strike. If a final offer is rejected, a strike vote will be taken. Most of you don't want to go on strike. But if you do, you have a right to vote for that. Or, the Employer, Billy [Respondent President William Stern], as a pressure tactic to slap some sense into the Union, and they can lock you out. That is Billy's leverage. He says, 'look these negotiations are not going anywhere. We are not coming to an agreement.' You are not going on strike or he finds out that you night be going on strike next week. And in order to protect his own business, he can lock the door, on all of you. That is absolutely legal. That is his pressure tactic that he has to make sure the Union agrees to his terms.

Unlike my colleagues, I would adopt the judge's finding that the Respondent's statement violated Section 8(a)(1) of the Act. In *NLRB v. Gissel Packing Co.,* the Supreme Court held that "[i]f there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts, but a threat of retaliation based on misrepresentation and coercion."[2]

Here, the Respondent warned employees in no uncertain terms that if they chose the Union and it did not agree to the Respondent's bargaining terms, "a strike vote will be taken" and that the Respondent had decided that it would lock out employees to "make sure the Union agrees to [its] terms." The Supreme Court's standard for an unlawful threat is therefore met, as the Respondent had no way of factually knowing how negotiations with the Union would progress, but nevertheless told employees with certainty that they would be locked out (for reasons unrelated to economic necessities) if they chose union representation.[3]

[1] *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969).

[2] *Gissel*, 395 U.S. 575, 618–619 (1969).

[3] For example, in *Walker Color Graphics*, 227 NLRB 455, 455, 466 (1976), the Board adopted the judge's finding that an employer made an unlawful threat when it said it would not allow the union to come to the plant but would resort to a lockout of the employees. The statement was not a mere prediction of the economic consequences of unionization and was not premised on cost consideration. Rather, it came in the context of the employer's other statements of the detrimental effect of unionization, adamant opposition to the union, and the assertion that the company would improve conditions if the employees rejected the union. See also *Essex Wire*, 164 NLRB 319, 319–320 (1967) (finding a threat of lockout violated Sec. 8(a)(1) when it was stated as the consequence were employees to fail to ratify a proposed contract). The unlawfulness of such statements, lacking factual certainty but presented as a certain outcome, has been established in several contexts. See, e.g., *Systems West LLC*, 342 NLRB 851 (2004) (finding coercive an employer's prediction, based on the union's existing master labor agreement with other employers, that current employees would lose their jobs because they would not qualify for the union's hiring hall, where applicable qualifications actually would be determined in collective bargaining); *Schaumburg Hyundai*, 318 NLRB 449, 450 (1995) (finding that an employer unlawfully threatened employees when, during an election campaign, it told them that it would sign an existing union contract that provided for lower wage rates and harsher working conditions, where those terms actually were subject to negotiation).

My colleagues' attempt to distinguish these cases is unsuccessful. First, the cases stand for the proposition that an employer may not convey that unionization will inevitably have adverse consequences when there is no basis for such a prediction. Second, as discussed below, to find an employer's statement coercive, Board precedent does not require that the employer have used terms such as "will" and "would"; certainty

There is no merit to my colleagues' claims that the Respondent was simply "shar[ing] with employees a lawful, correct statement of the law" and that the Respondent "did not convey that a strike or lockout would inevitably result from unionization." To be sure, an employer may make a prediction about the possible adverse consequences of unionization—if the prediction is phrased properly to avoid the implication that the employer will certainly impose those consequences itself if employees choose the union.[4] But, as described, that is not what happened here. Instead, the Respondent presented its threatened lockout as the certain result if the employees chose representation by the Union.

In support of their position that Penn did not convey inevitability, my colleagues rely on the fact that he stated Stern "could" lock out employees, not that he "would" do so. Penn's use of "conditional" words, however, is not enough to save his remarks. In *Harrison Steel Castings Co.*,[5] for example, the Board found an unlawful threat when an employer stated: "In a union company there is the ever-present possibility of a strike. Our customers rely upon dependable delivery of goods and services, and the risk of a strike may force our customers into looking for alternative suppliers, which could lead to a loss of jobs at our plant. When you consider your vote for or against a union examine that choice in terms of your own personal best interests rather than what is good for the employer."[6] Although the employer used the terms "possibility," "may," and "could," the Board explained that the strong suggestion that unionization could make the company noncompetitive and lead to the loss of jobs "had a tendency to coerce employees when viewed against the background of the [employer's] other unlawful conduct."[7] Similarly, in *Neo Life Company of America*,[8] the Board held that the employer unlawfully threatened that a strike was inevitable when it stated that if the employees voted for the union, "the [employer] 'would not want to bargain' with it, that it would have to bargain but would not have to sign a contract, and that if there were no contract a strike would follow, 'scabs' would come in, and there would be a 'real mess outside.'" Although the employer did not expressly state that it would refuse to bargain and that there definitely would be a strike, the Board considered the employer's statements in light of its other unlawful comments and held that "in this context it can be inferred that if the [employer] did not 'want to' nor 'have to' sign a contract, it would not sign one and a strike would follow."[9]

As in *Harrison Steel* and *Neo Life*, Penn's statements must be viewed against the backdrop of the Respondent's numerous other unfair labor practices, as found by the Board. In that context, the Respondent's statements reasonably conveyed to employees that unionizing would result in a strike and lockout. The Respondent certainly did not mitigate Penn's statements by providing assurances that strikes are not inevitable.[10] On the contrary, the Respondent held fast to the notion that Stern viewed a lockout as his way to force the Union to agree to the Respondent's bargaining positions in order to "protect his own business."

For those reasons, I agree with the judge that the Respondent's statement constituted an unlawful threat in violation of Section 8(a)(1).

II.

The Board is unanimous in finding that the Respondent not only committed serious and pervasive unfair labor practices during its antiunion campaign, but also continued to commit serious violations after the campaign was suspended to hinder the Board's investigation of those unfair labor practices. As the *Gissel* Court observed, when an employer's violations undermine employees' statutory rights in so many ways, "perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign."[11] That means requiring the employer to honor the union's previously established majority support by ordering the employer to recognize and bargain with the union. As I recently emphasized in my dissent in *Sysco Grand Rapids*, "[t]he *Gissel* Court wholly embraced the importance of the bargaining order as an indispensable component of national labor policy to secure employee free choice. The Board's responsibility to ensure employees' true representational desires, undistorted by undue employer influences, demands that the Board continue to exercise its authority to issue a bargaining order when

can be conveyed by other means, including clear implications in the context of other unfair labor practices. The Respondent conveyed such inevitability here.

[4] See *DHL Express, Inc.*, 355 NLRB 1399, 1400 (2010) (under *Gissel*, "lawful predictions of the effects of unionization must be based on objective fact and address consequences beyond an employer's control."); *New Process Co.*, 290 NLRB 704 (1988) (employer statements were lawful because the employer did not present the risk of job loss as an inevitable consequence of unionization beyond its control).

[5] 293 NLB 1158 (1989).

[6] *Harrison Steel,* 293 NLRB at 1159.

[7] Id.

[8] 2 73 NLRB 72 (1984).

[9] *Neo-Life Co. of America*, 273 NLRB at 72.

[10] See *Arkansas Lighthouse for the Blind*, 284 NLRB 1214, 1219 (1987) (finding an unlawful threat when the employer stated "after the Union came into three lighthouses" in California, "there were strikes" and "all three lighthouses closed up tight as a jug and never reopened;" employer did not provide assurances that strikes are not inevitable or that it would bargain in good faith if employees selected the union).

[11] 395 U.S. at 612 fn. 32.

necessary."[12] This case easily justifies the exercise of that authority.[13]

A.

In *Gissel*, the Supreme Court identified two categories of misconduct that warrant imposition of a bargaining order. Category I cases are "exceptional" and are "marked by outrageous and pervasive unfair labor practices."[14] Category II cases, while less exceptional, are "marked by less pervasive practices which nevertheless still have the tendency to undermine majority strength and impede the election process."[15] The Respondent's violations clearly rise to the level of a Category II *Gissel* order.[16]

The facts of the Respondent's violations are largely undisputed and are set forth more fully in the judge's decision. The Board unanimously agrees that the Respondent began its unlawful conduct immediately after the Union filed its petition, including making threats of job loss, facility closure, and loss of benefits. Such violations have long been deemed highly coercive with an enduring impact on employee free choice that is difficult to dissipate.[17] The Board also unanimously agrees that the Respondent committed additional violations impacting over half of the employees in the petitioned-for unit, which further supports a bargaining order. The Respondent interrogated employees about their union sympathies, made threats of reprisals for supporting the Union, indicated that supporting the Union was futile, created the impression of surveillance, and promised to improve employees' working conditions if they voted against the Union.[18] Longstanding Board precedent fully supports imposing a *Gissel* bargaining order in those circumstances.[19]

It also bears emphasis that William Stern, the Respondent's president, was personally involved in some of these unfair labor practices. Such a pattern of conduct that included the highest levels of company authority surely left an indelible mark on the employees. As the Board has recognized, "When the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten."[20]

Further, the Respondent's continuing hostility towards its employees' exercise of their Section 7 rights, even after the union campaign was halted and the Board's investigation of the unfair labor practice allegations had begun, is strong evidence that its unlawful conduct will persist in the event of another organizing campaign.[21] Particularly

[12] 367 NLRB No. 111, slip op. at 7 (2019).

[13] Although I would issue a remedial bargaining order in this case, I agree with my colleagues that other additional remedies are necessary to remedy the Respondent's unlawful conduct. Specifically, I join my colleagues in ordering a notice reading; granting the Union reasonable access to the Respondent's bulletin boards and all other places where notices are customarily posted; supplying the Union, on its request, the names and addresses of its current unit employees; and ordering the Respondent to give the Union notice of, and equal time and facilities for the Union to respond to, any address made by the Respondent to its employees on the question of union representation; and a broad cease and desist order. I also join their imposition of the Board's standard remedies for the violations found.

[14] *Gissel*, 395 U.S. at 613.

[15] Id. at 614.

[16] When considering a Category II bargaining order, the Board considers the seriousness and extent of the unfair labor practices to determine the impact of the violations on employee free choice by looking to a number of factors, including the number of employees affected, the size of the unit, the extent of dissemination, the identity of those committing the unfair labor practices, and whether the employer is likely to engage in future violations. *Stevens Creek Chrysler Jeep Dodge,* 357 NLRB 633, 637 (2011), enfd. 498 Fed.Appx. 45 (D.C. Cir. 2012).

[17] See *Adam Wholesalers*, 322 NLRB 313, 314 (1996).

[18] As the Board has observed, "[u]nlawfully granted benefits have a particularly long-lasting effect on employees and are difficult to remedy by traditional means not only because of their significance to the employees, but also because the Board's traditional remedies do not require a respondent to withdraw the benefits from the employees." *Gerig's Dump Trucking*, 320 NLRB 1017, 1017–1018 (1996), enfd. 137 F.3d 936 (7th Cir. 1998). See also *NLRB v. Exchange Parts Co.,* 375 U.S. 405, 409 (1964) ("employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if the employer is not obliged.").

[19] See, e.g., *A.P.R.A. Fuel Oil Buyer's Group*, 309 NLRB 480, 480–481 (1992) (employer unlawfully discharged employees, promised benefits, created the impression of surveillance, coerced affidavits from employees to revoke authorization cards, made statements of futility, interrogated employees about union sympathies, and offered benefits to employees in exchange for revocation of unfair labor practice charges); *Mayfield Produce*, 290 NLRB 1083, 1083 fn. 3 (1988) (employer unlawfully told employees that others would be discharged for union activities, created the impression of surveillance, coercive interrogated employees, promised benefits, and made multiple threats of discharge, loss of jobs, loss of overtime, change of operations, and plant closure); *Hedstrom Co.*, 235 NLRB 1193, 1194–1196 (1978) (employer unlawfully threatened to end overtime and take away benefits, solicited grievances and promised to remedy them, interrogated employees, and made implied threats of plant closure); *Schuckman Press*, 181 NLRB 158, 158 (1970) (employer unlawfully promised benefits, threatened employees, and interrogated employees). As discussed above, I would further find the Respondent unlawfully threatened to lock out employees if they selected union representation, which only adds to the justification for a *Gissel* bargaining order.

[20] *Consec Security*, 325 NLRB 453, 455 (1998), enfd. mem. 185 F.3d 862 (3d. Cir. 1999).

[21] See *M. J. Metal Products*, 328 NLRB 1184, 1185 (1999) (Category II *Gissel* order was supported in part by the employer's continued misconduct after the election because "[a]n employer's continuing hostility toward employee rights in its postelection conduct evidences a strong likelihood of a recurrence of unlawful conduct in the event of another organizing effort.") (internal citations omitted), affd. 267 F.3d 1059 (10th Cir. 2001); *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993) (employer's unlawful activities continued even after it agreed to enter into the purported informal settlement agreement it raised as a defense to the imposition of a bargaining order, and this indicated a strong likelihood of recurring unlawful conduct), enfd. 47 F.3d 1161 (3d Cir. 1995).

troubling is the Respondent's interference with the Board's investigation of the unfair labor practice charges. The Respondent threatened employees that if they testified they would be lying or providing false testimony and could be fined $5000 or jailed. Thus, the Respondent has shown not only its disregard for its employees' rights, but it has also sought to deter employees from enforcing those rights and demonstrated its general disregard for the authority of the Board and its processes. This misconduct plainly "reveals continued hostility to employee rights and substantial likelihood of the [r]espondent again engaging in illegal activities."[22]

Taken as a whole, the Respondent's unlawful conduct sent a clear message to employees that there would be serious adverse consequences if they supported the Union, and that the Respondent was committed to thwarting even employees' recourse to the Board itself. In those circumstances, it is quite plain to me that a fair election is unlikely and that instead the Board should issue a *Gissel* bargaining order as a necessary and fully appropriate remedy in this case.

B.

My colleagues nevertheless shy away from imposing a *Gissel* order. They cite that "over 3-1/2 years have elapsed between the Respondent's unfair labor practices and the issuance of our decision today," which they fear "creates a substantial risk that a *Gissel* bargaining order would prove unenforceable." They also assert that "a reviewing court might find that the absence of evidence that the hallmark violations were disseminated beyond the few employees who were subjected to them also weighs against enforcement of a bargaining order." As in my dissent in *Sysco Grand Rapids*, supra, I am unpersuaded that either of these concerns justifies withholding one of our most effective remedies.

About 3½ years have elapsed between the Respondent's last unfair labor practice and the Board's decision today. The Board has not hesitated to issue—and reviewing courts have enforced—a *Gissel* bargaining order within similar and even longer timeframes.[23] Accordingly, I am unconvinced that the passage of time justifies omitting a bargaining order here.[24]

Nor is there merit to the concern that the Respondent's violations were not sufficiently disseminated. There were 65 eligible voters at the relevant time. My colleagues and I agree that the Respondent violated Section 8(a)(1) when Miko Penn told a group of about 36 employees that President Stern had done many things for employees in the past and "now he is going to be in a situation where is going to bargain tough against you." Six employees were directly impacted by the remaining unfair labor practices found, and other violations by Pasalagua and Stern involved small groups of employees. For the reasons discussed above, I would further find the Respondent also unlawfully stated that it would lock out employees in a group meeting with about 36 employees present. Even under the majority's findings alone, however, over half of the eligible voters were impacted by the Respondent's unfair labor practices. Such dissemination easily supports a Category II *Gissel* order, particularly when combined with the timing of the Respondent's continued unfair labor practices throughout the preelection period and into the Board's investigation of those violations.[25]

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[22] *Tufo Wholesale Diary, Inc.*, 320 NLRB 896, 896 (1996), enfd. 113 F.3d 1230 (2d Cir. 1997).

[23] See, e.g., *Garvey Marine, Inc. v. NLRB*, 245 F.3d 819 (D.C. Cir. 2001) (enfg. 328 NLRB 991 (1999)) (4 years); *Evergreen America Corp. v. NLRB*, 531 F.3d 321, 332–333 (4th Cir. 2008) (4 years). Accord: *J.L.M. Inc. v. NLRB*, 31 F.3d 79, 85 (2d. Cir. 1994) ("the passage of three years is not itself sufficient to indicate that the effects of the Company's ULPs will no longer be felt."). Moreover, "[p]ractices may live on in the lore of the shop and continue to repress employee sentiment long after most, or even all, original participants have departed." *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772 (5th Cir.1978) (enforcing *Gissel* order despite turnover).

[24] Relatedly, I would deny the Respondent's motion to reopen the record to introduce evidence of changed circumstances. According to the Respondent, a fair rerun election is possible due to the departure of the labor consultants who participated in many of the violations, the lessening of President Stern's role at the company, and unit turnover. Initially, the Respondent never raised the asserted changes in its management structure at the hearing, and so I find no basis to reopen the record to permit the introduction of this evidence now. Further, there is no reason to forego a bargaining order based on the Respondent's assertion that it has experienced significant employee turnover, which supposedly has diminished the effects of its unlawful conduct on the current work force. See *Garvey Marine, Inc. v. NLRB*, 245 F.3d 819 (D.C. Cir. 2001) (enforcing *Gissel* order because lore of the shop "affect[s] the ability of new hires and veteran employees alike to vote their true preferences in a new election."); see also *NLRB v. Intersweet, Inc.*, 125 F.3d 1064, 1070 (7th Cir. 1997) (bargaining order enforced where 20 percent of the original workforce remained); *Amazing Stores, Inc. v. NLRB*, 887 F.2d 328, 330–331 (D.C. Cir. 1989) (bargaining order affirmed despite "almost complete turnover of personnel in the bargaining unit."). Finally, there is no merit in the Respondent's contention that it should be able to introduce evidence of its voluntary agreement to post notices advising employees of their rights under the Act and that the Respondent is now neutral as to whether employees should unionize. The Respondent has not demonstrated that such postings could or would cure the unfair labor practices that justify a *Gissel* bargaining order here. See *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

[25] See *Armon Co.* 279 NLRB 1245, 1245 fn. 2, 1255–1256 (1986) (Category II bargaining order when the employer's threats and interrogations were directed at half of the unit employees); *Piggly Wiggly*, 258 NLRB 1081, 1081–1082 (1981) (bargaining order appropriate when half of the unit was subject to employer's unlawful threats, surveillance, or promises of benefits); see also *Stevens Creek Chrysler Jeep Dodge,* 357 NLRB 633, 637 (2011) (finding a Category II *Gissel* bargaining order warranted in light of the seriousness of the violations and the pervasive nature of the conduct, including factors such as the number of employees affected, the size of the unit, the extent of dissemination, and the identity

My colleagues express particular concern that the Respondent's hallmark violations were not widely disseminated among unit employees.[26] This concern misunderstands the standard for a Category II *Gissel* bargaining order. A Category II bargaining order requires the Board to consider the seriousness and extent of the employer's unfair labor practices and their impact by looking at, among other things, the number of employees affected, the size of the unit, the extent of dissemination, the identity of those committing the unfair labor practices, and whether the employer is likely to engage in future violations.[27] While a hallmark violation may be present in a Category II situation, it is not required to justify a bargaining order when there are numerous other unfair labor practices that together have a lasting adverse impact on employee free choice.[28] Thus, in *Astro Printing Services*,[29] the Board issued a bargaining order even when there had been no hallmark violations. As the Board noted in *Flamingo Hilton Laughlin*, in Category II cases it considers "*all* the unfair labor practices committed by the employer in determining whether a bargaining order is appropriate," including threats, interrogation, and solicitation.[30]

Here, my colleagues and I agree that the Respondent has committed numerous serious unfair labor practices, including during the pre-election period and during a Board investigation. Further, as discussed above, these unfair labor practices touched large numbers of employees in the unit and involved the highest levels of management. Under *Astro Printing Services*, this suffice to support a Category II order, even without the existence (or dissemination) of "hallmark" violations. But, in fact, the Respondent *did* commit several hallmark violations, including threatening job loss and plant closure. Taken as a whole, the Respondent's violations clearly support the issuance of at least a Category II bargaining order, notwithstanding my colleagues' concerns that those "hallmark" violations were not disseminated widely enough.

III.

In *Gissel*, the Court instructed that "[i]f the Board finds that the possibility of erasing the effects of past practices and ensuring a fair election (or a fair rerun) by the use of traditional remedies though present, is slight and that employee sentiment once expressed through cards would, on balance be better protected by a bargaining order, then such an order should issue."[31] As I noted in my dissent in *Sysco Grand Rapids*, above, I would follow the Supreme Court's instruction and impose a bargaining order to fulfill the Board's responsibility to enforce the Act and issue an order that fully effectuates employees' rights in this case.

Dated, Washington, D.C. July 31, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your union membership, activities, sympathies, or support.

WE WILL NOT coercively interrogate you about your participation in the National Labor Relations Board's investigation of unfair labor practice charges filed against us.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT threaten you with the sale of our business if you support the Union.

and position of the individuals committing the unfair labor practices), enfd. 498 Fed. Appx. 45 (D.C. Cir. 2012).

[26] The term "hallmark" violations has been used to describe unfair labor practices that are highly coercive and have a lasting effect on election conditions. See *NLRB v. Jamaica Towing*, 632 F.2d 208, 212–213 (2d Cir. 1980). These generally include plant closure, threats of plant closure, discharge or adverse actions against key union supporters, and the unlawful grant of benefits. Id.

[27] See *Stevens Creek Chrysler Jeep Dodge,* 357 NLRB at 637.

[28] See *NLRB v. Jamaica Towing*, 632 F.2d at 213–214. By contrast, the extent to which hallmark violations have been disseminated is more critical in a Category I situation. See id. at 212–213.

[29] 300 NLRB 1028, 1029 (1990) ("Although the Respondent did not commit any 'hallmark' violations (such as threats of plant closure, threats of discharge, or actual discriminatory discharge), the unfair labor practices were serious in nature, commenced on the day the Union demanded recognition and affected the entire small bargaining unit.").

[30] *Flamingo Hilton-Laughlin*, 324 NLRB 72, 73 (1997).

[31] *Gissel*, 395 U.S. at 614–615.

WE WILL NOT threaten you with the closure of your work facility if you support the Union.

WE WILL NOT threaten that we will declare bankruptcy if you support the Union.

WE WILL NOT threaten you with loss of benefits, reduced work hours, and unspecified reprisals if you support the Union.

WE WILL NOT threaten that you will be fined or jailed if you testify during the Board's investigation of unfair labor practice charges filed against us.

WE WILL NOT threaten that selecting a union representative would be futile.

WE WILL NOT promise you increased wages, benefits, equipment, and other improved terms and conditions of employment to discourage you from supporting the Union.

WE WILL NOT discourage you from testifying in the Board's investigation of unfair labor practice charges filed against us.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL hold a meeting or meetings during working hours and have this notice read to you and your fellow workers (with Spanish translation) by owner, William Stern (or, if he is no longer the owner, by a high-ranking responsible management official), in the presence of Ricardo Pasalagua, Miko Penn, and a Board agent and an agent of the Union if the Region and/or the Union so desire, or by a Board agent in the presence of Stern (or another high-ranking management official if Stern is no longer the owner), Pasalagua, Penn, and an agent of the Union if the Union so desires.

STERN PRODUCE COMPANY, INC.

The Board's decision can be found at www.nlrb.gov/case/28-CA-163215 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Fernando Anzaldua and *Sandra Lyons, Esqs.,* for the General Counsel.

Patrick Scully and *John Doran, Esqs. (Sherman & Howard L.L.C.),* for the Respondent.

David Barber, Esq., for the Charging Party.[1]

DECISION

Statement of the Case

LISA D. THOMPSON, Administrative Law Judge. In this case, the General Counsel requests a Gissel bargaining order to remedy the alleged "serious and substantial" unfair labor practice (ULP) conduct of Stern Produce Company, Inc. (Respondent).2 The General Counsel asserts these unfair labor practices preclude conducting a fair election.

On November 3, 2015, the United Food and Commercial Workers Union, Local 99 (Charging Party, Local 99 or the Union) filed an ULP charge against Respondent, alleging multiple violations of the National Labor Relations Act (NLRA or the Act).[3] On December 21, 2015, the Union filed a second ULP charge against Respondent[4] and amended it on January 29, 2016. The Union filed a third ULP charge against Respondent on January 29, 2016.[5] On July 19, 2016, the Regional Director for Region 28 (Regional Director) consolidated all three charges and issued a consolidated complaint and notice of hearing.

The consolidated complaint (complaint) alleges that Respondent, through its owner, supervisors and/or admitted agents, violated Section 8(a)(1) and (5) of the Act when it: (1) interrogated employees about their union membership, activities, and sympathies, (2) promised its employees increased benefits and improved terms/conditions of employment to discourage them from supporting the Union, (3) created an impression of surveillance among employees concerning their union activities, (4) threatened employees with various, unspecified reprisals and a loss of benefits if they supported/voted for the Union, (5) threatened employees that the owner would sell his business and/or close the facility if employees selected the Union, (6) told employees that the Union would not be able to do anything to improve their terms/conditions of employment and it would be futile for them to vote for the Union, (7) promised employees increased and other unspecified benefits if the Union lost the Board-conducted election, (8) implemented a previously unenforced open door policy to discourage employees from voting for the Union, (9) created an impression of surveillance among employees by distributing a flyer to employees stating that union organizers

[1] Although Barber entered his appearance in the case, he did not appear in or participate at the hearing.

[2] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); see also *Engelhard Corp.,* 342 NLRB 46, 60–61 (2004) enfd. 437 F.3d 374 (3d Cir. 2006).

[3] Case 28–CA–163215.

[4] Case 28–CA–166351.

[5] Case 28–CA–168680.

visited employees at their home without revealing the source of that information, (10) implemented a gift card program to discourage employees from supporting the Union, (11) promulgated a rule/directive that prohibited employees from talking about the Union and threatened employees with unspecified consequences for doing so,[6] (12) discouraged employees from and threatened employees with unspecified reprisals for participating in a Board investigation, (13) created an impression of surveillance among employees by suggesting that Respondent knew which employees participated in the Board investigation, (14) interrogated employees about their participation in the Board investigation, and in so doing, interfered with a Board proceeding, (15) threatened employees with unspecified reprisals for providing testimony to the Board during the Board investigation, and (16) failed and refused to recognize and bargain with the Union as the employees' exclusive bargaining representative.

Respondent filed its answer, and an amended answer, denying all material allegations and setting forth its affirmative defenses to the consolidated complaint.

This case was tried before me in Phoenix, Arizona, from September 6–9, 2016. At trial, the General Counsel amended the consolidated complaint. The amendment alleged that Respondent violated Section 8(a)(1) of the Act when, in a letter dated July 8, 2016, Respondent: (17) blamed the Union for preventing the Company from making changes to employees' wages, benefits, and working conditions, and (18) represented to employees that the Union would file ULP charges against Respondent if Respondent provided employees a wage increase. Respondent denied these allegations on the record at the hearing.

On September 9, 2016, the trial recessed so the General Counsel could seek enforcement of several trial subpoenas in U.S. District Court. The trial resumed to conclusion from February 6–9, 2017.

After the trial, the General Counsel and Respondent filed extensive posthearing briefs, which I have read and considered. Based on those briefs and the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following[7]

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

At all material times, Stern Produce has been a corporation with an office and place of business in Phoenix, Arizona. Respondent has been engaged in the wholesale distribution of food products.

It is undisputed that, during the 12-month period ending November 3, 2015, Respondent purchased and received goods valued in excess of $50,000 directly from points outside the State of Arizona. Accordingly, I find that Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also undisputed, and I find that, at all material times, Local 99 has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

1. Respondent's facility

Stern Produce is a wholesale refrigerated distribution company that provides produce to grocery stores, restaurants, nursing homes, and hospitals in Arizona. It has facilities in Phoenix, Tucson, and Flagstaff, Arizona. The conduct at issue in this case occurred at Respondent's facility on 7th Street and University Drive in Phoenix (Respondent's facility).

Respondent employs approximately 90 employees. Employees work in three major departments: purchasing, sales, and operations. Warehouse employees and drivers work in the operations department. Respondent employs about 35 drivers and 16 to 18 warehouse employees, working day and night shifts. At the time that the Union petitioned to represent Respondent's employees, Respondent employed a total of 65 drivers and warehouse employees.

At all material times, William "Billy" Stern (Stern) was the president of Stern Produce. He oversaw the general business and day-to-day operations of the Company. During October and November 2015, Kirk Massey (Massey) served as Respondent's vice president. Kerry Boykins (Boykins) was in the process of becoming the warehouse manager who oversaw the warehouse employees. Transportation Manager Jesus Tarango (Tarango) oversaw the drivers.[8]

Tina Leese was an advisor for Respondent, who reported directly to Stern. While Leese's exact title is unclear from the testimony, it is undisputed that Leese oversaw the books, helped make decisions, ensured the facility ran smoothly, took care of any problems, and acted as a liaison for Stern. Although Stern downplayed Leese's role, testifying that she "sometimes" worked at Respondent's facility, I credit Leese's testimony that she worked at the facility Monday through Friday, 3 a.m. to 6 p.m. and on sometimes weekends as well.[9]

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[6] In its brief, the General Counsel withdrew their allegation that Respondent violated the Act when one of its supervisors promulgated an overly broad and discriminatory rule/directive prohibiting employees from talking about the Union and threatened employees with unspecified consequences for doing so. See GC Br. at 83; see also GC 1(i) at ¶5(p).

[7] Abbreviations used in this decision are as follows: "Tr." for the Transcript, "GC Exh." for the General Counsel's exhibits, "R. Exh." for Respondent's Exhibits, "GC Br." for the General Counsel's brief, and "R. Br." for Respondent's brief. Specific citations to the transcript and exhibits are included where appropriate to aid review and are not necessarily exclusive or exhaustive.

[8] I find that Stern and Tarango were supervisors of Respondent within the meaning of Sec. 2(11) of the Act and agents of Respondent within the meaning of Sec. 2(13) of the Act. See R. Answer at ¶4(a). I further find that, between October and November 2015, Massey was also a supervisor and agent of Respondent under the Act.

[9] I have based my credibility findings on multiple factors, including, but not limited to, the witness' opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; the impact of bias on the witness' testimony; the quality of the witness' recollection; testimonial consistency; the presence or absence of corroboration; the weight of the evidence; the witness' demeanor while testifying; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. *Daikichi Sushi*, 335 NLRB 622, 633 (2001), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003); *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997).

2. The Union's organizing campaign

It is undisputed that Local 99 sought to organize and represent Respondent's drivers and warehouse workers. Beginning around May 2015, the Union began soliciting signed authorization cards from Respondent's drivers and warehouse employees. Union representatives routinely made house visits to employees, and according to Union Organizer Ron McDade (McDade), organizers were almost always welcomed by employees. The Union also held meetings at the union hall.

It is also undisputed that, as the Union began educating employees about organizing, the Union collected 42 authorization cards, which represented 64 percent—or a majority of support—from the drivers and warehouse employees (the petitioned-for unit).[10] As such, on October 14, 2015, the Union filed a petition for election with Region 28 (the Region) of the National Labor Relations Board (NLRB or the Board.)[11]

Stern was out of town when he first learned of the Union's organizing drive. Leese telephoned and told him about the election petition. Thereafter, Stern, Region 28 and the Union entered into a Stipulated Election Agreement, which set an election date for November 5, 2015. Pursuant that agreement, Respondent provided the Region and the Union with a list of 65 eligible employee voters from the proposed unit.[12]

Respondent opposed unionization. Stern hired labor consultant firm, The Crossroads Group, and consultants Ricardo Pasalagua (Pasalagua) and Miko Penn (Penn), to represent Respondent's view.[13] According to Sterm, he never experienced an organizing campaign before and employees approached him expressing confusion about the process, their rights, and the Union's claims. As a result, Stern asked the consultants to educate employees about the process. While Stern testified that he wanted to debunk myths that were rumored around the facility about the process, he also admitted that he wanted to keep his company a union-free environment. I also credit consultant Penn who testified that she is typically hired by employers to convince employees to vote "no" on unionization.[14]

On October 22, 2015, Pasalagua and Penn met with Stern and other management personnel to learn about the nature of Respondent's business, employees' schedules, the election petition and what Stern wanted them to do vis-à-vis, the organizing campaign. They also coordinated meetings with employees to inform them about the election, the process and to convince them to remain union free.[15]

It is undisputed that, between October 22 and November 3, 2015, Pasalagua and Penn held various large and small group meetings with Respondent's drivers and warehouse employees.[16] These meetings were mandatory as Respondent posted flyers about the meetings at the timeclock requiring employees to attend. While Pasalagua was equivocal about his role at Respondent's facility, I credit Penn's testimony that Pasalauga led Respondent's antiunion campaign since he was bilingual (spoke Spanish and English—Penn only spoke English and a large portion of employees were Spanish-speaking) and had more experience than Penn.[17]

Pasalagua used four sets of PowerPoint presentations (also known as phases), to convey information about unionization. These phases were written in English and Spanish. Pasalagua conducted meetings with the warehouse workers while Penn held meetings with the drivers.

B. Specific Incidents of Alleged Unlawful Conduct

1. The October 2015 large group meeting

On October 23, 2015, Pasalagua conducted a large group meeting with Respondent's warehouse employees during various shifts. During these meetings, Pasalagua went over the PowerPoint presentations, each one covering a different subject. Each meeting lasted approximately an hour. Pasalagua held four sets of meetings with each group of warehouse employees.

Penn also held her first large group meeting with the drivers on October 23. Her meetings were given in English. Approximately 14 to 28 drivers attended. Like Pasalagua, Penn held several sets of meetings with the drivers during their shifts, and she showed them the PowerPoint presentations. Penn took attendance at her meetings to keep track of which employees received the information and to ensure she followed up with any specific employee who could not attend at that time.

Although Penn testified that she typically: (1) shared a statement of employee's rights under Section 7 of the Act, (2) explained to employees their right to freely choose to unionize, (3) assured them that no retaliation would result regardless of their decision to unionize, and (4) explained the role of the Board, I credit an audio recording made by driver Roberto Rosas (Rosas), a union supporter, that detailed the content of what Penn discussed in her large group meetings with employees.

Specifically, during a mandatory large group meeting held in/around October 29, 2015 with approximately 36 employees, Penn was recorded making the following statements:

> Some of you in here already have been saying that you would like to be shop steward, and you have told your coworkers that.[18]
>
> . . .
>
> You also have the option to strike. If a final offer is rejected, a strike vote will be taken. Most of you don't want to go on strike. But if you do, you have a right to vote for that. Or, the Employer, Billy, as a pressure tactic to slap some sense into the Union, and they can lock you out. That is Billy's leverage. He says, 'look these negotiations

Credibility findings need not be all or nothing propositions, and it is common for a fact finder to credit some, but not all, of a witness' testimony. *Daikichi Sushi,* supra at 622.

[10] GC Exhs. 7, 21, 33 (a-hh); see also GC Exh. 34–38.

[11] GC Exh. 4 at ¶3.

[12] Tr. 94; GC Exh. 7; see also GC Exh. 4 at ¶2 and att. A. The parties stipulated to the unit description at the hearing.

[13] At all material times, Pasalagua and Penn have been agents of Respondent within the meaning of Sec. 2(13) of the Act. See GC Exh. 1(n) at ¶4(b).

[14] Tr. 97–99, 106, 120; see also Tr. 196.

[15] Tr. 211–212.

[16] Tr. 213.

[17] Tr. 213.

[18] GC Exh. 22(b).

> are not going anywhere. We are not coming to an agreement.' You are not going on strike or he finds out that you may be going on strike next week. And in order to protect his own business, he can lock the door, on all of you. That is absolutely legal. That is his pressure tactic that he has to make sure the Union agrees to his terms.[19]
>
> . . .
>
> Just so you know, the Union representative was here last night. A couple of employees approached the Union and said, 'Will you sign this? Part of that was on strike. Part of that was on – you are promising me two, five, ten dollars more per hour. All this is great stuff. Put it in writing. Guarantee me that you can get me one penny more.' And they said that they could not sign it. Why won't they sign it? They don't have the power to. Like I've been telling you all along . . .[20]
>
> . . .
>
> Why is he [Stern] scared, right? He's not scared. He's concerned. And he doesn't want to be put in a situation where he's negotiating against your interests. Because remember, Billy is not going to be bargaining with his stuff. The Union doesn't bargain with its wages and benefits and the Union still gets paid too. What goes on the negotiating table are your wages, your hours, your overtime, your everything. So, if you put Billy in that arena where he has to bargain tough, he will. He is going to make sure that his business survives. He doesn't want to have to. Look at all the stuff he has done for many of you in here. Many of you were given a second chance by him at one point or another – you've gone to him and asked for loans, asked for him to change your schedule . . . now he is going to be in a situation where he is going to bargain tough against you. If that is the road you want to go down. So, if you put him that room, like a boxing match, if you put him there, he is going to fight. He doesn't want to be there because he wants to make sure he can do what is best for the company, and the company is you.[21]

Although Rosas was vague and evasive when asked what and who prompted him to make the audio recording, I nevertheless find the recording authentic and representative of what Penn told employees during her large group meetings.

2. The small group meetings

It is undisputed that Pasalagua and Penn also met regularly with employees either individually or in groups of two or three. The small group meetings were held in one of two conference rooms at Respondent's facility. Although Stern testified that he attended and "listened in" on a few small group meetings, but only when employees asked him to attend, I credit the various employees who testified that they never asked for Stern's presence and he attended and played an active role in discussions with them and the consultants.

Moreover, while Stern, Penn, and Pasalagua either denied or were equivocal about whether individual employees were called over the intercom to meet with the consultants, I credit dispatcher Lynette Guzman (Guzman) who testified that Acting Warehouse Manager Boykins instructed her to call certain employees over the intercom to come meet with Pasalagua.[22] In so doing, I find that Pasalagua told Boykins who he wanted to speak with, and subsequently, Boykins instructed Guzman to announce their names over the intercom system such that everyone in the warehouse knew who was being summoned to meet with Pasalagua.

Nevertheless, it was during these small group meetings with employees that many of the alleged violations occurred.

3. The alleged coercive statements made during small group meetings

The substance of what occurred in many of these meetings turns on an evaluation of credibility.[23] Having carefully reviewed the record, and based on the testimony of employees Jose Pacheco (Pacheco), Jose Loc (Loc), Rosas, Jose Ruiz (Ruiz), and Eduardo Mancera (Mancera), I find the following facts:

a. Pacheco's small group meetings with Pasalagua

At all material times, Pacheco served as a forklift operator for Respondent. He was also a union supporter. Although Pacheco claimed he attended six or seven small group meetings in late October 2015—approximately 2 weeks before the scheduled election—I do not find Pacheco credible on this point since he had difficulty remembering many of the basic details of his conversations with Pasalagua, i.e., who was present at the meetings with him, when were they held, etc. However, I do find that, each time Pacheco met with Pasalagua, Guzman announced his name over the intercom which was heard throughout the entire facility.

In one meeting with Pasalagua, Pasalagua told Pacheco that if the Union did not come into the Company, Stern would try to improve salaries, warehouse workers' positions, and provide more opportunities for employees to grow. Pasalagua also told him that if employees gave Stern a vote of confidence and employees voted against the Union, Stern would give employees a raise.

For his part, Pasalagua denied the statements attributed to him by Pacheco. However, I credit Pacheco's testimony over that of Pasalagua regarding this incident, mainly because his testimony was corroborated by other employees who testified to being told similar statements from Pasalagua.

Specifically, as discussed later in this decision, drivers Rosas and Ruiz testified that, during one of their small group meetings with Pasalagua, Pasalagua told them to give Stern a "second chance" and if they voted against the Union, Stern would ensure that "things would change [implying for the better]." Accordingly, I find that Pasalagua made the statements attributed to him during his first meeting with Pacheco.

Pacheco recalled another meeting with Pasalagua, Stern, and warehouse laborer Gasper Beltran (Beltran) in late October 2015. In that meeting, Pasalagua told them that Stern had an offer

[19] Id.
[20] Id.
[21] Id.
[22] Tr. 120.
[23] Id. at fn. 9.

from Sysco to sell his company, but Stern rejected it because he did not want to leave his employees without employment. Pasalagua reiterated to Pacheco and Beltran that, while Stern did not want to sell his company, if presented with the opportunity, Stern had the option of selling to Sysco. Pasalagua then stated words to the effect that "if the union won, Stern could reduce work hours in order to give employees a raise or he would hire more employees that could do their work and give the veteran workers a penny raise." Pasalagua ended with telling Pacheco and Beltran if employees could not get anything [regarding salary increases] from their supervisor, they could talk to Pasalagua. Beltran confirmed Pacheco's version of the meeting.[24]

For his part, Stern denied ever meeting with or participating in a small group meeting with Pacheco or Beltran. However, I credit Pacheco's and Beltran's testimony over that of Stern since both corroborated the other's testimony and had specific recollection of Stern participating in their small group meeting. In contract, Stern's testimony in this regard amounted to general, perfunctory denials that the incident occurred.

While Stern also denied ever receiving any offers to buy his business, including any from Sysco, he admitted to receiving six or seven voicemails since 2013 of people expressing interest in buying his company. I find Pasalagua used this information in his conversations with Pacheco and Beltran. Lastly, although Stern denied telling anyone he would consider selling his company and never threatened to sell or close down his business if employees unionized, which I find credible, testimonial evidence reveals that it was *Pasalagua*, not Stern, who made the statement to Pacheco and Beltran.

For his part, Pasalagua again denied making the statements attributed to him. However, I do not find Pasalagua credible for several reasons. First, Pasalagua often gave testimony that was directly controverted by his own admissions on the record. For example, Pasalagua initially denied meeting with individual employees prior to the scheduled election, then, after being pressed by the General Counsel, changed his testimony and admitted that he had.

Second, Pasalagua was very verbose in his responses, gave longwinded and oftentimes nonresponsive answers, and spoke rapidly, as if he did not intend for counsel to understand his responses. Even after I instructed him to slow down and answer the questions asked, he continually spoke rapidly and was evasive and longwinded in his responses. Moreover, as Pasalagua gave his testimony on direct (as a Rule 611(c) witness), he often leaned back in his chair and his posture appeared sloughing and overly relaxed. This left me with the impression that he failed to appreciate the seriousness of the proceedings, and coupled with his inconsistent testimony, made him appear less than fully credible.

Third, it appears that Pasalagua tried to evade responding to his subpoena ad testificandum and subpoena duces tecum which were timely served on him by the General Counsel in the case. Despite attesting that he never received the General Counsel's subpoenas, I note that both subpoenas were properly served and received at Pasalagua's then-current address of record.

Lastly, and most importantly, despite being instructed by me not to speak to anyone about his testimony, I discovered that Pasalagua, at the behest of Respondent counsel, served as an interpreter for Respondent when Respondent counsel interviewed two employee witnesses who were expected to testify on behalf of the General Counsel.[25]

Apparently, both employee witnesses were told they were required to meet with Pasalagua and Respondent's counsel as part of their subpoena. When the witnesses were questioned by Respondent counsel, Pasalagua gained knowledge about what each of these witnesses would testify despite being aware that he could have been recalled at a witness in this case.

Technically, Pasalagua's conduct is not a direct violation of my sequestration order, yet I find that it is an indirect violation because his conduct violates the spirit of my order. In fact, Pasalagua (and Respondent's counsel) knew full well that his appearance during these witnesses' interviews was, at minimum, a conflict of interest and at worst, was intimidating for the employee witnesses testifying in this matter.[26] Needless to say, I find Pasalagua's conduct (and the conduct of Respondent's counsel in arranging the situation) completely improper, and as a result, made Pasalagua's testimony less than fully credible.

In making the above factual findings, I credit Pacheco's version of events over that of Pasalagua for several reasons.[27] First, Pacheco's testimony is corroborated by driver Juan Juarez (Juarez) who confirmed being told similar statements by Pasalagua. Specifically, Juarez testified that Pasalagua told him in a small group meeting words to the effect that "there were many companies that were union that ultimately go bankrupt"—the implication being if Respondent unionized it would also go bankrupt. I found Juarez's testimony credible on this point.

Second, Pacheco had a specific recollection of this conversation with Pasalagua. He appeared even tempered, and his demeanor was composed and steady. In contrast, Pasalagua's testimony was generalized, nonspecific and amounted to general, perfunctory denials that the incident occurred. Third, and most importantly, because Pacheco is a current employee testifying before management and against his own economic interest, his testimony has a special guarantee of reliability.[28] Accordingly, I

[24] Tr. 812–813, 839–840.

[25] These witnesses ignored their subpoenas for which the General Counsel sought enforcement in U.S. District Court. Because of their failure to appear, Respondent counsel learned these witnesses' identity and that they were expected to testify. With this knowledge, Respondent counsel, in my opinion, took advantage of the recess in the hearing in order to interview them prior to their expected testimony. I find counsel's conduct in this regard, at minimum, violates the Board's rules prohibiting discovery, and at most, manipulative and inherently improper. They were admonished for their conduct on the record.

[26] Again, I am extremely troubled by the conduct and propriety of seasoned Respondent counsel who arranged to interview these employee witnesses during a recess in the hearing knowing full well that discovery is not permitted in Board proceedings.

[27] See *Daikichi Sushi*, 335 NLRB 622, 622 (2001) (credibility findings need not be all or nothing propositions, and it is common for a fact finder to credit some, but not all, of a witness' testimony).

[28] See *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978) (testimony of current employees, particularly while management representatives are present, that accuses respondent of wrongdoing has inherent

find that Pasalagua made the statements attributed to him during his small group meeting with Pacheco and Beltran.

b. Loc's small group meetings with Pasalagu

Jose Loc (Loc), one of Respondent's drivers, also confirmed being told that Stern could close the business and that the Union would disadvantage employees. In late October or early November 2015, Loc attended two meetings alone with Pasalagua. In the first meeting, Transportation Manager Tarango told Loc to go meet with Pasalagua in the conference room. Once Loc arrived in the conference room and after some general discussion about what was going on with the Company and the Union's organizing campaign, Pasalagua told Loc that the Union was not good for the Company or the workers, and that there was a "possibility" that Stern would close the business. Pasalagua also told Loc that employees would be better off gathering together and speaking with Stern directly.

Pasalagua then said the Union would promise employees many things but ultimately Stern would make the final decision. Pasalagua also stated that, if the Union won, Stern would have to close the business without paying anyone and employees would need to go on strike if they did not win. Loc remained silent during the entire meeting. Ultimately, Pasalagua asked Loc if he had any questions, and Loc replied, "no." At that point, the meeting ended and Loc returned to work.

Loc met with Pasalagua a second time. This time, Pasalagua saw Loc in the warehouse and signaled Loc to come talk with Pasalagua in the small conference room. Only Loc and Pasalagua were present in the room. Once they arrived in the conference room, Pasalagua discussed an incident with Loc that occurred about a week before their second meeting.

A week prior, while driving his work truck, Loc hit the bumper of another vehicle. When Loc told Stern about the accident, Loc explained to Stern that there was a discrepancy in what happened—Loc admitted that he hit *a part* of the other vehicle's bumper, but the mechanic argued that Loc damaged the *entire* bumper. Stern believed Loc's version of the accident.

In any event, as Loc told Pasalagua the details of the accident in their meeting, Pasalagua told Loc words to the effect, "so as a result of the accident, Stern did you a favor—he believed your version of the accident. Now you should believe in Stern." Pasalagua then told Loc words to the effect that if he believed in Stern, then there would be more opportunities at the facility. Pasalagua then said that the Union was "no good" then asked Loc if he had any questions. Loc replied, "no" and the meeting concluded.

Pasalagua again denied making any statements about Stern closing the business or promising employees any benefits if they voted against the Union. However, I credit Loc's testimony over that of Pasalagua for the same reasons noted in my credibility analysis above. Although there were considerable discrepancies in Loc's testimony regarding when his small group meetings were held, whether he was on light duty or on leave when the meetings occurred and why he ignored his subpoena ad testificandum served on him by the General Counsel, I find these inconsistencies insignificant.[29] Rather, I credit Loc's testimony as to what Pasalagua told him, because it is corroborated by Pacheco and Juarez who testified to being told similar statements by Pasalagua.

Moreover, Loc was articulate and appeared even tempered throughout his testimony. His responses were direct, specific and he maintained great recall of incidents. In contract, Pasalagua gave general, nonspecific denials. Lastly, Loc's testimony has enhanced reliability due to his status as a current employee.[30] Loc's overall demeanor struck me that he was committed to telling the truth. Accordingly, I find that Pasalagua made the statements attributed to him by Loc.

c. Rosas' small group meetings with Pasalagua

Driver Rosas is a longtime employee of Respondent. He was a union supporter and served on the union organizing committee at Respondent's facility. He attended the mandatory large group meeting conducted by Penn on October 29, 2015, where he recorded her statements to employees.

Prior to the Union's petition, it is undisputed that the drivers and warehouse employees complained for several years about the lack of wage increases or promotion opportunities. Many of them complained to their respective supervisors but nothing was done to address their concerns.

Rosas attended a small group meeting with Juarez, Stern, and Pasalagua. When Rosas and Juarez arrived in the conference room, at some point, Rosas reiterated that employees had been complaining about the lack of wage increases and promotion opportunities. At that point, Stern told them that he wanted an opportunity for the Union not to come onboard and that "things were gonna change." Stern also told the men that, while he was unaware that employees requested wage increases and improved working conditions, nothing could be done about their previous requests since his supervisors never told him about it. Although Stern also told Rosas and Juarez that Stern knew employees were organizing (only because they were organizing), there would be no reprisals. However, Stern made a point to ensure that employees received guarantees from the Union.

In making the above findings, I credit Rosas' testimony about his conversation with Stern/Pasalagua, primarily because his testimony is corroborated by Pacheco and Loc, who testified to being told similar statements by Pasalagua. Although Stern "could not recall" meeting with Rosas and Juarez, he did not affirmatively deny that he attended the meeting either. Finally, because of Rosas' status as a long-term current employee, Rosas' testimony warrants enhanced reliability under the circumstances.[31] Accordingly, I find that Stern made the statements attributed to him by Rosas.

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reliability because these witnesses are testifying adverse to their pecuniary interests).

[29] Loc also testified to various statements given to Respondent's counsel John Doran during the recess of the hearing. These statements are arguably favorable to Respondent. However, because I previously found Respondent's counsel's conduct tantamount to conducting unlawful discovery of a witness, and wholly inappropriate, I will not consider *any* statements given by Loc during his interview with Respondent's counsel in this decision.

[30] See *Gold Standard Enterprises*, supra..

[31] Id.

d. Ruiz' small group meetings with Pasalagua

Driver Ruiz, a union supporter, attended two small group meetings. He recalled his first meeting was held in Respondent's small conference room. He, Stern, and Pasalagua attended. During his meeting, Pasalagua told Ruiz that Stern wanted to speak with him. When he arrived in the conference room, Stern asked Ruiz whether he supported the union. Ruiz replied that he did not know whether he supported the Union, because he needed more information.

As the conversation proceeded, Ruiz lifted his shirt and showed Stern and Pasalagua that he had been herniated. Ruiz discussed with them his previous work-related injury and how he had not been properly compensated through workers compensation. After learning of Ruiz' issue, Pasalagua responded that "Stern will fix your problem." Stern apologized, told Ruiz that he was unaware of what happened to him and that it "will not happen again." Ruiz admitted that he had never told Stern about his workers compensation issues prior to this small group meeting.

Ruiz attended a second meeting with Rosas, Pasalagua, and Stern in November 2015. The meeting lasted approximately 10 minutes. When the men arrived, Pasalagua and Stern asked them whether they supported the Union. Before they could respond, Pasalagua and Stern asked the men to vote against the Union because Stern would "change everything" and Stern wanted a "second chance" [to change everything]. At some point, Pasalagua interjected that there "was a really small group that wanted the union." Thereafter, Stern gave both men a document (called the list of guarantees) stating that Respondent would not retaliate against them no matter how the men voted in the election.[32] After handing the men the guarantees, Stern told them that his cell phone "was there" and that they could use it to report anything going on at the facility. The meeting ended without incident.

As with Pacheco and Rosas, in making the above findings, I credit Ruiz' testimony and discredit the testimony of Stern and Pasalagua for the same reasons stated in my credibility analysis above. Overall, I found Ruiz' testimony was generally corroborated by Pacheco and Rosas. His recollection of his conversations with Pasalagua and Stern were specific in nature, and his demeanor was steady and composed. As such, Ruiz struck me as committed to speaking the truth. Accordingly, I find that Pasalagua and Stern made the statements attributed to them by Ruiz.

e. Mancera's small group meetings with Pasalagua

Warehouse employee Mancera, a longtime employee of Respondent, was a union supporter. He attended two small group meetings with Pasalagua a few weeks prior to the election. In his first meeting, Mancera met with Pasalagua and approximately 8 to 10 night-shift workers in the conference room. Pasalagua introduced himself, told employees he was a legal counselor to Stern, and that he was meeting with them to discuss the Union.

Pasalagua then told employees about the benefits and disadvantages of the Union but noted that the only disadvantage to unionizing was that Stern and the Union would have to negotiate everything. Pasalagua then stated that Stern was unaware of what was going on with the Company and that Stern could make changes if employees gave him a vote of confidence. At that point, Pasalagua told employees that Stern was open to any complaints they had and, based on that, Stern would see what changes he could make. However, Pasalagua stressed that, if the Union came on board, employees could not have any direct dealings with Stern; rather employees would have to wait until the Union negotiated with Stern.

Mancera's second small group meeting occurred in late October/early November 2015. He, Pasalagua, and Stern were present. At that meeting, Stern asked him how things were going at work. Mancera responded affirmatively. At that point, Stern told Mancera that he knew Mancera was 'a good worker," hoped that everything was going well for him, and if Mancera would give Stern a vote of confidence, he would try to make things better for the night-shift workers. Stern stressed that he could not promise Mancera anything otherwise he could face an unfair labor practice charge. However, Stern again told Mancera that if he would give Stern a vote of confidence, Stern would try to make changes. Pasalagua was silent during the meeting.

At that point, Mancera reminded Stern that the night workers had petitioned for jackets to protect them against the cold while loading merchandise. Stern replied that he would try to get the jackets. The meeting concluded at that point.

Approximately 4 days before the election date, Mancera was working in the warehouse. Pasalagua saw Mancera and walked over. Pasalagua told Mancera words to the effect, "Stern is upset with you because you are riling up employees." Mancera denied riling up anyone. Pasalagua then told Mancera that he should calm down because Stern was considering Mancera for a supervisor position on the night shift once "this [election] blows over." Mancera repeated that he was not the person riling up anyone and challenged Pasalagua to point out the person who accused Mancera. In response, Pasalagua said, "well you know," then left.

For his part, Pasalagua denied that he made the statements attributed to him by Mancera. However, I credit Mancera's testimony for several reasons. First, Mancera's testimony is generally corroborated by Pacheco, Ruiz and Rosas, who confirmed being told similar statements by Pasalagua. Second, Mancera's demeanor was especially notable, because he was even-keeled, well-spoken and direct and specific in his recall of events, particularly since he had just gotten off work at 4:00 a.m. the day of the hearing and was without sleep when he gave his testimony. Most importantly, Mancera's testimony has a heightened reliability due to his status as a current employee.[33]

In contrast, as stated above, Pasalagua's demeanor and general perfunctory denials coupled with his conduct during the hearing recess (as outlined above) left me with the impression that he was evasive and manipulative, and overall, not committed to telling the truth. Accordingly, I find that Pasalagua made the statements attributed to him by Mancera.

[32] See GC Exh. 23; see also GC Exh. 12.

[33] See *Gold Standards*, 234 NLRB at 629 (testimony of current employees, particularly while management representatives are present, that accuses respondent of wrongdoing has inherent reliability because these witnesses are testifying adverse to their pecuniary interests).

f. Beltran's small group meetings with Pasalagua

Beltran attended small group meetings with Pasalagua. I found Beltran's testimony credible where he explained that, when he was summoned to Respondent's small group meetings, he always met with Pasalagua and either Pacheco, warehouse employee Paula Duran (Duran) and/or warehouse worker Socorro Chacon (Chacon).

However, I do not find the remainder of Beltran's testimony credible for several reasons. First, Beltran's testimony was not corrobated by any other witness. For example, although Beltran testified, in general, that Pasalagua told employees: (1) that employees could not trust the Union because the Union could not deliver on what they promised since Stern, as the owner, always had the last word, (2) that employees were placing their jobs at risk by paying attention to the Union and (3) that Stern could close his business; Chacon and Duran (who Beltran claimed always attended his small group meetings with him) never corroborated Beltran's account of their meetings. Moreover, even though Beltran claimed to have attended small group meetings with Pasalagua (and Chacon, Duran, or Pacheco) at least four to five times a week prior to the election, he could not provide *any* specific dates when these meetings occurred.

Second, I note that Beltran gave inconsistent and often times contradictory testimony. For example, while Beltran stated that, in one of his small group meetings, Pasalagua told employees that the Union may not be helpful to employees, Beltran admitted that Pasalagua also told employees that, because the Union and Stern would have to negotiate, Stern would not necessarily have to agree with the Union's demands. In fact, Beltran admitted that neither Stern, Pasalagua, or Penn ever told him that Respondent would deliberately refuse to negotiate with the Union if they won the election.[34] Nor did Stern, Pasalagua, or Penn ever threaten him with reprisals based on how he voted in the election or threaten a strike or lockout if the Union won the election.[35]

In addition, although Beltran recalled Pasalagua telling employees that, at other companies that voted in a union, some employees lost their jobs, Beltran also admitted that Pasalagua told employees that the only way Stern would ever shut down his company would be if the Company fell on financial hard times.[36]

Finally, while Beltran inferred in his testimony that he was being pressured by Respondent to vote against the Union, he also admitted that he felt scared and pressured by the Union—to support them—and some of his coworkers—to vote against the Union.[37]

Respondent's counsel also attempted to call Beltran's veracity into question by eliciting testimony that Beltran allegedly falsified a W-4 tax form from 2007 (executed in 2009) which resulted in Respondent receiving a "no-match" letter from the Social Security Administration (SSA). However, I was persuaded that Beltran's testimony lacked veracity when Chacon testified that Beltran, who testified the day before Chacon, telephoned her to ask her forgiveness for testifying that she attended small group meetings with him that she had not attended. Not only do I find Beltran's testimony suspect after learning of this development, as discussed later in this decision, Chacon testified that Pasalagua never made any of the statements Beltran attributed to him.

In any event, I find that Beltran clearly violated my sequestration order and instructions not to discuss his testimony with anyone. Except where I specifically noted, Beltran's conduct in this regard coupled with his inconsistent and contradictory statements called his entire testimony into question and, as such, made his testimony completely unbelievable.

g. Chacon's small group meetings with Pasalagua

Warehouse employee Chacon attended two small group meetings in late October/early November 2015. The first meeting Chacon attended with Beltran, Duran and Pasalagua. The second meeting was attended by Beltran, Duran, warehouse employee Oscar Pacheco (different from Jose Pacheco) and Pasalagua. In both meetings, Chacon never heard Pasalagua make any threats about Stern closing or selling the Company. In fact, despite what had been rumored around the facility, it was Chacon who asked Pasalagua whether Stern would sell/close the business if the Union won, to which Pasalagua responded that Stern would not close the company, and the only way Stern would close the facility is if the Company had financial problems.

Overall, I find Chacon's testimony credible. Specifically, Chacon appeared confident and even tempered on the stand despite rigorous cross examination by the General Counsel. She was articulate and straightforward in her testimony.

While Jose Pacheco previously attested that Pasalagua told him that Stern "could" sell the Company to Sysco, which I found credible, I nevertheless find Chacon's testimony credible as it is possible that Pasalagua never made the statement to *Chacon* during her small group meetings. Accordingly, while I still believe Pasalagua told Pacheco and others that Stern could sell the Company, I believe Pasalagua did not make that statement to Chacon.

4. "Where Have I Been?" flyer

At some time prior to the scheduled election date, Respondent provided a flyer titled "Where Have I Been?" to employees.[38] The flyer was signed by Stern. The flyer was distributed in response to the Union's flyer to employees inquiring where Stern had been.[39] While Stern did not recall who drafted his flyer, I credit Leese's testimony that she provided the flyer to Stern for him to look over and sign. The flyer was written in English and Spanish.[40]

The flyer stated:

First, I would like to take a moment to thank the majority of Stern employees for their overwhelming support!

> Second, the union has questioned where I have been. This is Where I Have Been for the Past Two Years Since I took Over Stem!
>
> • Repairing & Raising the Loading Docks $81,000.00
> •Purchasing New Trucks for your Safety 5,250.000.00
> • Adding Lights for the Warehouse 33,000.00

[34] Tr. 833.
[35] Tr. 827.
[36] Tr. 835–836.
[37] Tr. 827.
[38] GC Exh. 14(a).
[39] Tr. 142.
[40] GC Exh. 14(b).

> • Repairing the Roof 98,000.00
> •Repairing the Cooling Tower for Ammonia Room 30,000.00
> • New Automated Freezer Door 32,000.00
> • Repair Roof Top Ammonia Piping 13,000.00
> • New Pallet Jacks 78,000.00
> • New Fork Lifts 185,000.00
> • Cell Phones provided to drivers for $30,000.00 work use & personal use during off hours at no charge.
>
> When the union came to Stern [the company], the union organizers came with a bag full of promises including more money, better wages and better working conditions. In fact, the union organizers even visited employees at home without an invitation. When Stem employees recently asked the union to put their promises in writing, the union organizer refused!
>
> Like I have said all along, I CANNOT make any promises. However, you can see now that the big difference between me and the union is that:
>
> I DON'T LIE!!

5. The 25-hour speech

It is undisputed that, on November 3, 2015, a second large group meeting (known as the 25th Hour Speech) was held in the large conference room. Approximately 35 to 50 employees attended. Stern, Pasalagua, and Penn were also present.

It is also undisputed that, during the meeting, Stern read the following statement to employees:

> If there is one good thing that came out of all of this, it is that we now know that the lines of communication are open without having a third party between us.
>
> . . .
>
> I appreciate all of your comments and concerns that you have voluntarily shared with me during this campaign. All of you know that l cannot legally make any promises. One thing I can tell you, however, is that I hear you loud and clear.
>
> As you know by now it does not matter what the union promises you. Those promises cannot come true if I do not agree.
>
> The law only requires that 1 bargain in good faith. That does not mean that I have to agree to any proposal the union puts on the table.
>
> Also, there is no time limit placed on negotiations. Negotiations can last two months, six months or even years. Even the outcome of negotiations cannot be guaranteed. As a result, you can end up with more, the same or less than what you have now.
>
> Last week, a union organizer denied that they have made you promises. They said they have not been visiting your homes. All of you know very well that this is absolutely untrue.
>
> How can you trust the union when they are not being honest with you?
>
> . . .
>
> After my meetings with you, it became clear to me that my management team has done a poor job communicating your issues and concerns to me. I assumed that everything was just fine when I asked how you were doing and you responded, "we are okay."
>
> I understand now that many of you did not want to jump the chain of command. I now have a clear picture that I need to be in more direct contact with all of you. Like I said before, I cannot promise you anything but I can guarantee that I am not a liar.
>
> In fact, unlike the union that refused to sign the guarantees you provided to them, I took the initiative to put together the following.[41]

At that point, Stern read a list of guarantees, which basically told employees there would be no reprisals against them regardless of their decision to unionize.[42] Stern read the speech in English while Pasalagua translated it in Spanish.[43]

At end of the meeting, employees received copies of the signed and notarized guarantees in English and Spanish.[44] It is undisputed that neither Stern nor Pasalagua threatened to close/sell the Company if employees voted for the Union or promised increased wages if employees voted against the Union during this meeting.

6. Lack of union support

It is undisputed that, as the Union and Respondent began presenting their respective positions about the organizing campaign, support for the Union declined. The issue is what were the reasons behind the declining support?

Although Rosas testified that, prior to the election, approximately 15-20 employees participated on the Union's organizing committee, yet one week before the election, the organizing committee stopped participating and only four to five employees attended union meetings, I credit Chacon's testimony that it was not solely due to Respondent's anti-union campaign. In fact, after attending several Union meetings, Chacon decided on her own to stop supporting the Union because she no longer saw the benefit of unionizing, and she became frustrated because the Union appeared to be incessantly trying to talk to employees at home and at work. Despite the Union's conduct, Chacon tried contacting organizers Ricardo Gomez (Gomez) and Ponciano Hernandez (Hernandez) several times to have her concerns addressed but neither of them ever responded to her inquiries.

Testimonial evidence also reveals that, during one of her small group meetings she attended with Duran and Beltran in November 2015, Chacon, on her own, told Pasalagua she no longer supported the Union. She then gave Pasalagua a written statement to that effect. While there was considerable testimony concerning who or what motivated Chacon to give her statement to Pasalagua, I credit Chacon that she simply reiterated to Pasalagua what she previously told Gomez, before the scheduled election, that she was no longer interested in continuing with the Union because union organizers were not responding to her inquiries. Chacon confirmed she gave her statement to Pasalagua of her

[41] GC Exh. 13.
[42] GC Exh. 12(a).
[43] GC Exh. 12(b).
[44] GC Exh. 12(a)-(b).

own volition.

Duran also stopped attending union meetings on her own accord and no one from Respondent ever told her to stop attending meetings. In fact, even Beltran felt pressure to make a decision about the Union from the Union (to support representation) and his coworkers (not to support the Union). Although I did not find Beltran particularly credible concerning other incidents in this case, other credible testimonial evidence corroborated his testimony in this regard.[45]

7. Election postponed

It is undisputed that, on November 3, 2015, 2 days before the scheduled election, the Union filed the first ULP charge in this case (28–CA–163215). The charge challenged the various alleged coercive statements employees reported being told by Pasalagua, Penn, and Stern. That same day, Region 28 issued an Order postponing the election pending an investigation into the above ULP charge.

8. Pasalagua/Penn read ULP charge to employees

It is undisputed that on November 4, 2015, the day after Region 28 postponed the election, Pasalagua held group meetings with Respondent's warehouse employees where he told them that the election was canceled because the Union filed its first ULP charge against Respondent. Pasalagua admitted that he read the actual ULP charge verbatim to employees.

It is also undisputed, and Pasalagua admitted that, he read verbatim the allegations listed in the Region's December 3, 2015 letter requesting certain evidence from Respondent.[46] According to Pasalagua, he detailed, one by one, each allegation claimed by the Union and gave his own explanation regarding what each allegation meant. Pasalagua also read the individual employee's names who filed each allegation against Respondent. Pasalagua also admitted reading three or four of the allegations in Spanish although he declined to translate the allegations in writing at that time.

It is further undisputed that, on December 3 or 4, 2015, Penn returned to Respondent's facility and read/updated the drivers on the Union's allegations. She also read the allegations as they were detailed in the Region's letter requesting evidence from Respondent which included naming the individual employees who filed the charges against Respondent.[47] She read the allegations in English.

Pasalagua also held five or six one-on-one meetings with employees to discuss the Union's ULP charge against Respondent. Duran confirmed that Pasalagua met with her and read the ULP allegations to her verbatim. According to Duran, not only did Pasalagua verbally read and translate the allegations into Spanish, he gave her a written translation of the charges with employees' names (driver Uvaldo Ponce, Ruiz, and Rosas) on them.

Beltran also met with Pasalagua individually where he told Beltran that the ULP allegations were ridiculous and the Union would not be able to proceed. According to Beltran, Pasalagua told him that the Union's motive in filing the charge was to consume time and prevent Stern from carrying out the changes he promised. At that point, Pasalagua told Beltran that he knew Beltran had been called to interview with the Board and told him to give his statement so long as he told the truth. Pasalagua warned Beltran that if he did not tell the truth, Respondent could file charges against him. Toward the end of the meeting, Pasalagua asked Beltran if he was standing firm with the company then questioned his support of Respondent.

As I previously noted, while I did not find Beltran credible for the reasons outlined above, because his testimony was corroborated by Duran, who I find credible, I find that Pasalagua made the statements attributed to him.

It is undisputed that, on December 18, 2015, the Union filed a second ULP charge against Respondent (28–CA–166351). It is undisputed that Pasalagua returned to the facility after this second ULP charge was filed and again read the charge form to warehouse employees.

It is further undisputed that, in January 2016, Pasalagua conducted approximately seven or eight meetings with warehouse employees to inform them of the Region's January 8, 2016, letter requesting evidence. He admitted sharing the information with "pretty much 90 percent of the employees in the warehouse." Pasalagua read each allegation contained in the letter in Spanish and told employees the identities of the employees named in the letter. He also admitted to providing Spanish-translated copies to employees who requested one.

I also credit Jose Pacheco who testified that, around January 5, 2016, he attended a small group meeting with Pasalagua where Pasalagua told employees that the Union did not have much money to continue filing charges against Respondent.

It is further undisputed that, around mid-January 2016, Pasalagua again met with employees at the facility. During this meeting, Pasalagua showed employees, including Pacheco, the charges against Respondent and told them that the charges were not valid. According to Pacheco, Pasalagua then told employees that if employees testified concerning the charges, they would be lying, giving false testimony and could be fined $5000 or given 5 years in jail. I credit Pacheco's testimony regarding this incident as I previously found that his demeanor, even temperament, and mannerisms on the stand made him believable.

In another meeting with Pacheco and warehouse employee Reynalda Prieto Subias, (Subias), Pasalagua told the pair that there was no basis for the Union's charges and that the charges were not credible. Pasalagua then reiterated that if Pacheco or Subias testified before a judge, they would be lying. Again, for the reasons stated above, I find Pacheco's testimony credible. Accordingly, I find that Pasalagua made the statements attributed to him by Pacheco concerning the Union's second charge and employees' testimony to the Board.

9. Interfering with Board investigation

Based on the testimony of Juarez and Pacheco, I find the following facts:

In early January 2016, Juarez returned from his route and he ran into Transportation Manager Tarango. Tarango asked Juarez to come to the office to speak with Pasalagua. Juarez obliged.

[45] See *Daikichi Sushi*, supra (credibility findings need not be all or nothing propositions and it is common for a fact finder to credit some, but not all, of a witness' testimony).

[46] GC Exh. 19.

[47] Id.

Once Juarez arrived in the office, Pasalagua told Juarez that Pasalagua heard that Juarez would be giving a statement to the Board. Juarez confirmed what Pasalagua heard. At that point, Pasalagua told Juarez that it was not necessary for him to give his statement to the Board since the Board would be asking the same questions as Respondent. Pasalagua then gave Juarez a copy of the Region's December 5, 2015 letter that listed the Union's allegations and requested evidence from Respondent. At some point, Juarez asked Pasalagua how he knew Juarez was giving a Board statement but Pasalagua did not answer. However, Juarez admitted that Pasalagua told him it was his decision to give his statement to the Board.

I also credit Pacheco who confirmed that, around mid-January 2016, Pasalagua showed employees the ULP allegations, told employees that the Board charges were invalid, and if employees testified concerning those charges, they would be lying, providing false testimony, and they could be fined $5000 and given 5 years in jail. While Pasalagua denied the statements attributed to him, for the reasons previously outlined above, I discredit Pasalagua and credit Juarez' and Pacheco's testimony.

10. The gift card program

Based on the documentary evidence and the testimony of Respondent's advisor, Tina Leese, I find the following facts:

In late 2014, Leese, on behalf of Respondent, created a gift card program to reward drivers who received 100 percent on their Department of Transportation (DOT) vehicle inspection report.[48] These impromptu DOT inspections were required in the produce delivery industry and were necessary to ensure delivery trucks met DOT requirements.

Leese created the gift card program to reward drivers who were able to meet Respondent's deadlines despite being pulled over and kept on the side of the road for extended periods by DOT inspectors.

With Stern's approval, in 2014, Respondent began providing gift cards to local restaurants for deserving drivers who made 100 percent on their DOT inspection reports and still managed to deliver Respondent's produce on time. Once the program began, Leese kept a record of rewards given to employees.[49]

Although Driver Uvaldo Ponce (Ponce) initially testified that, immediately prior to the scheduled election, he received his first ever $50-Olive Garden gift card from Leese for passing a DOT inspection but had never received a gift card in the past, he subsequently wavered, admitting that he could not recall whether he received the gift card before or after the scheduled election. As such, I do not find Ponce's testimony particularly credible.

I credit Leese's testimony, which is supported by the documentary evidence, that she gave gift cards to other drivers in 2014 and 2015 (well in advance of the union campaign) based solely on their passing their DOT inspections.

11. Respondent's open door policy

Prior to the scheduled election, Respondent maintained an open door practice/policy in its employee handbook. The handbook containing the practice/policy was distributed to employees when they onboard with Respondent. The policy has been in practice for many years even prior to when Stern became president of the company.[50]

The policy essentially allows any employee who has any concerns about anything, whether personal or financial, involving personnel issues, or even an interpersonal conflict with a coworker, the ability to speak directly to their manager/supervisor or Stern himself. Stern's telephone number was listed in the handbook and employees were given direct access to Stern to discuss any issues affecting them.[51]

In making the above findings, I credit Stern's uncontroverted testimony that, well prior to the union campaign, he often walked around the warehouse, greeted employees, and asked them how things were going at work.[52] Stern also confirmed that, both before and after the union petition was filed, employees often approached him about personnel issues, requested days off, asked for additional work hours and personal loans when they ran into financial difficulties, and generally voiced their concerns to him about their terms and conditions of employment.[53] Leese also witnessed employees talking directly to Stern about issues, thereby taking advantage of the open door practice/policy. I find her testimony credible in this regard.

I also credit Stern when he confirmed that, after the Union petition was filed, employees approached him on their own accord with questions about the election process.[54] Although Stern was aware that some employees were discussing the policy amongst themselves, he admitted that he never specifically discussed the policy with any employee following the filing of the petition.[55] Nevertheless, despite that various employees testified to being *unaware* of the open door policy until the union's organizing campaign, I find that employees *utilized* the policy by going directly to Stern to speak with him about various professional or personal issues they had.

12. The July 8, 2016 letter

It is undisputed that, on June 22, 2016, the Union sent a letter to Stern seeking to confirm rumors the Union heard from employees that Stern promised certain employees a $2-per-hour wage increase.[56] In the letter, the Union advised Stern that it would not oppose the $2-per-hour wage increase, and if Stern provided such an increase, they would not file any ULP charges against Respondent.

Stern, however, never promised to provide such an increase to employees.[57] As such, on July 8, 2016, Stern sent a letter to all employees updating them on the status of the election and advised employees that the Union filed additional ULP charges against Respondent.[58]

With respect to the rumored $2-per-hour wage increase, Stern

[48] Tr. 988.
[49] Tr. 988–989, 995.
[50] Tr. 127, 131; see also Tr. 999–1000; see also GC Exh. 11.
[51] Tr. 999–1000.
[52] Tr. 129.
[53] Tr. 135.
[54] Tr. 130.
[55] Tr. 127.
[56] GC Exh. 17.
[57] Tr. 156.
[58] GC Exh. 16.

told employees, "The union has filed more and more charges; as long as those charges are still being investigated by the government, Stern will comply with its legal obligation to continue the "Status Quo" regarding your wages, benefits or working conditions."[59] The letter was distributed to employees in English and Spanish.[60]

In making the above findings, I credit Stern's testimony and rely solely on the above-referenced letters which speak for themselves. Accordingly, I do not find that Stern or his letter to employees promised anyone a $2-per-hour wage increase as alleged in the complaint.

Discussion and Analysis

The record in this case clearly supports a finding that Respondent, through Stern and/or Respondent's agents Pasalagua and Penn, committed a series of 8(a)(1) violations in response to the Union's organizing campaign and employees' lawful pursuit of their union activities.

A. The 8(a)(1) *Interrogation Violations*

The General Counsel asserts that Stern and/or Respondent's agents, Pasalagua and Penn, violated Section 8(a)(1) of the Act by interrogating Ruiz, Rosas, Mancera, and Beltran about their union membership/activities/sympathies and by interrogating Pacheco and Juarez about their participation in the Board investigation.

Interrogating an employee about his/her union support/sympathies violates Section 8(a)(1) of the Act if, under all the circumstances, the questions reasonably tend to restrain, coerce, or interfere with Section 7 rights.[61] Factors that may be considered to determine whether an alleged interrogation is unlawful include: (1) the identity of the questioner and his/her status in the employer's hierarchy, (2) the place and method of questioning, (3) any background of the employer's hostility, and (4) the nature of the information sought. [62] The Board also considers whether the employee is an open union supporter. [63] While not an exhaustive list that should not be mechanically applied, the aforementioned factors, known as the *Bourne* factors, are intended to guide the fact-finder in determining, as a whole, whether the questioning at issue tended to restrain, coerce, or interfere with an employee's Section 7 rights. The General Counsel bears the ultimate burden of proving Respondent's conduct interfered, restrained and/or coerced employees from exercising their Section 7 rights.[64]

In complaint paragraph 5(a)(i), the General Counsel alleges that Respondent, through Stern and Pasalagua, unlawfully interrogated drivers Rosas and Ruiz about whether they supported the Union. I agree.

Applying the *Bourne* factors, Stern is the president of the Company, and Pasalagua, an agent of Respondent, was specifically hired by Stern to speak on Stern's behalf, to convince employees not to vote for the Union. Second, the nature of the question itself—i.e., whether Ruiz and Rosas would vote for the Union, is inherently coercive. In fact, Ruiz was twice interrogated about his union sympathies. Moreover, the location of the questioning; first, alone with Stern and Pasalagua in a small conference room; second, accompanied by his coworker Rosas in the same conference room, heightens the intimidating nature of the interrogation.

In addition, the context of Stern's and Pasalagua's interrogation occurred merely weeks before employees were scheduled to vote, and at a time when Stern and Pasalagua were trying to keep Respondent a union-free environment. As such, their questioning of Ruiz and Rosas was even more coercive. While Ruiz, to his credit, told Stern and Pasalagua that he was unsure how he would vote, I find Ruiz' response indicative of how threatened he was with Stern's and Pasalagua's inquiries. On the whole, I find Stern's and Pasalagua's actions violated Section 8(a)(1) of the Act as their conduct would reasonably be viewed as tending to restrain and/or interfere with Ruiz and Rosas exercising their Section 7 rights.

Complaint paragraph 5(j)(i) avers that Respondent, through Stern, violated the Act when he interrogated Mancera about his union membership, activites and/or sympathies. However, under the circumstances, I do not find that Stern unlawfully questioned Mancera in his first two one-on-one meetings.

Specifically, in the first meeting, the record demonstrates that Pasalagua met with Mancera and approximately 8 to 10 other warehouse workers in a conference room. As such, nothing about the location of the meeting or the fact that Mancera was accompanied by several of his coworkers suggests intimidation. Moreover, record evidence reveals that Pasalagua introduced himself, explained who he was and why he called the meeting then discussed the advantages and disadvantages of unionizing. Nothing about the context or content of the meeting is inherently coercive. Furthermore, there is no evidence that Pasalagua singled out Mancera or specifically inquired of Mancera's union membership, activities/sympathies.

Similarly, Mancera's second meeting with Stern and Pasalagua would not reasonably be viewed as an unlawful interrogation. Although I find the location of Mancera's second meeting—i.e., in a small conference room by himself—suspect, the questioning was not inherently coercive. In fact, the record reveals that Stern asked Mancera how things were going with Mancera at work, told Mancera that Stern thought he was a "good worker," that Stern hoped everything was going well for him and asked Mancera if he would give Stern a vote of confidence. While this exchange proves, in my view, that Stern unlawfully promised Mancera a benefit in exchange for voting against unionization, I find no clear evidence that Stern or Pasalagua unlawfully interrogated Mancera as to his union membership, activities or sympathies. Accordingly, I recommend

[59] Id.

[60] Id. at (a)-(b).

[61] *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985) (citing *Bourne v. NLRB,* 332 F.2d 47 (2d Cir. 1964).

[62] *Scheid Electric*, 355 NLRB 160, 160 (2010), see also *Manorcare Health Services–Easton*, 356 NLRB 202, 218 (2010); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000); *Evergreen America Corp.*, 348 NLRB 178, 208 (2006).

[63] See, e.g*., Gardner Engineering*, 313 NLRB 755, 755 (1994), enfd. as modified on other grounds 115 F.3d 636 (9th Cir. 1997).

[64] 29 U.S.C. § 160(c) (violations of the Act are adjudicated "upon the preponderance of the testimony" taken by NLRB).

dismissing complaint paragraph (j)(i).

Next, complaint paragraph 5(i)(i) asserts that Pasalagua unlawfully interrogated Beltran about his union activities. However, because I did not find Beltran credible as a whole, I conclude that the General Counsel failed to prove that Pasalagua violated the Act as alleged.[65] As stated above in my factual findings, Beltran often gave inconsistent, contradictory testimony that made his version of events less than believable. For example, although Beltran asserted that he was pressured by Respondent to vote against the Union, he admitted he was pressured by the Union (to vote for the Union) and his coworkers to vote for/against the Union. Most importantly, both warehouse employees Chacon and Duran, who accompanied Beltran at every meeting with Pasalagua, failed to corroborate any of the alleged coercive statements Beltran claimed Pasalagua made.[66]

Most importantly, Beltran violated my sequestration order by contacting Chacon to apologize to her for lying about her appearance at some of his meetings with Pasalagua. Beltran's actions in this regard called his entire testimony into question and made him wholly incredible as a witness. Accordingly, Respondent did not unlawfully interrogate Beltran, and as such, did not violate the Act with respect to Beltran.

Lastly, in complaint paragraphs 5(r)(i) and (s)(iii), the General Counsel claims that Respondent, through Pasalagua, unlawfully interrogated Juarez and Pacheco about their participation in the Board's investigation of the Union's ULP charge. I agree.

Again, the credited testimony shows that Pasalagua, an agent of Respondent, attempted to convince Juarez not to provide his statement to the Board during its investigation of the Union's ULP charges. As such, the individual interrogating Juarez (Pasalagua) coupled with the nature of the questioning is highly coercive. Moreover, the location of the interrogation—alone in a conference room, heightens the coercive nature of the situation. In addition, the context of Pasalagua's questioning—occurring on the eve of Juarez's Board interview—makes the interrogation even more intimidating.

Similarly, I conclude that Pasalagua's statements to Pacheco (and others) regarding what would happen if they testified before the Board was equally coercive. In fact, Pasalagua threatened Pacheco (and others) that if they gave their statements to the Board, they would be lying, providing false testimony and could be fined. Despite that there were several employees present, I conclude that the nature and content of Pasalagua's statement, which constitutes a threat, occurring on the eve of the Board's investigation, was inherently coercive.

Accordingly, Respondent violated the Act when Pasalagua interrogated Juarez and Pacheco about their participation in the Board's investigation.

B. Section 8(a)(1) *Creating the Impression of Surveillance Violations*

The General Counsel next asserts that Respondent, through Pasalagua and Penn, on various but separate occasions, violated the Act by creating the impression among employees that their union activities were under surveillance.

The test for determining whether an employer unlawfully creates the impression of surveillance is an objective one and involves the determination of whether the employer's conduct, under the circumstances, was such that would tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act.[67] Specifically, the trier of fact must view the evidence on the whole and determine whether the employee would reasonably assume from the employer's conduct and/or statements that their union activities had been placed under surveillance.[68]

Although an employer's mere observation of open, public union activity on or near its property will not constitute unlawful surveillance, the employer cannot "do something 'out of the ordinary' to give employees the impression that it is engaging in surveillance of their protected activities."[69] The Board's analysis thus focuses on whether the observations were ordinary or represented unusual behavior.[70]

Similarly, the test for whether an employer's statement creates an impression of surveillance is whether the employee would reasonably assume from the statement that his/her union activities were under surveillance.[71] The Board has held that a supervisor does not create an impression of surveillance by a mere statement that he is aware of a rumor about union activities "so long as there is no evidence indicating that the respondent could only have learned of the rumor through surveillance."[72] "Since a rumor is, by definition, talk or opinion widely disseminated with no discernible source, employees could not reasonably assume from a respondent's knowledge of such a rumor, without more, that their union activities had been placed under surveillance."[73]

Complaint paragraph 5(b)(i) (A-B) asserts that Respondent, through Penn, unlawfully created an impression among employees that their union activities were under surveillance when Penn told employees, in a recorded conversation, that she knew that Union representatives were at Respondent's facilities. I disagree. Specifically, I do not find sufficient evidence to explain that Penn's observations and knowledge of the union representative's activities were out of the ordinary. In fact, I could posit that Penn may have been at Respondent's facility, walking out and casually observed Union representatives meeting with employees. Or, an employee could have told Penn or Penn could have learned through rumor that union representatives were present at Respondent's facility prior to her statement being recorded. Either way, the General Counsel failed to present credible evidence showing Penn did something unusual to learn of the union representative's presence at Respondent's facility. Accordingly, I conclude that Respondent did not violate Section 8(a)(1) of the Act as alleged; and as such, dismiss this complaint allegation.

Similarly, Respondent did not violate the Act by creating an

[65] See Sec. B(3)(a), supra.

[66] Id.

[67] See *Broadway*, 267 NLRB 385, 400 (1983) (citing *United States Steel Corp. v. NLRB*, 682 F.2d 98 (3d Cir. 1982)).

[68] See *Fred'k Wallace & Son, Inc*., 331 NLRB 914 (2000).

[69] See *Fred'k Wallace & Son, Inc*., 331 NLRB at 915.

[70] *Aladdin Gaming, LLC*, 345 NLRB 585 (2005), rev. denied 515 F.3d 942 (9th Cir. 2008).

[71] *United Charter Service*, 306 NLRB 150 (1992).

[72] *South Shore Hospital*, 229 NLRB 363 (1977), citing *G. C. Murphy Co.*, 217 NLRB 34, 36 (1975).

[73] Id.

impression of surveilling employees regarding its knowledge that Union organizers visited employees at home.[74] Rather, the record reveals that it was common knowledge among employees (through rumors and employees telling Respondent) that union organizers visited employees at home. In fact, Union Organizer McDade testified about visiting employees' homes and warehouse employee Chacon testified that she complained to Respondent about the union representatives visits to employees' homes. There is no evidence that Respondent, through Stern, Pasalagua, or Penn, engaged in any unusual behavior or did "something out of the ordinary" for employees to reasonably conclude that Respondent was monitoring organizers' visits to their homes.

Respondent, through Stern and/or Pasalagua, also did not create an impression of surveillance when they told drivers Ruiz and Rosas that a majority of employees no longer supported the Union but only a small group of employees supported the Union.[75] Again, record evidence reveals that Chacon told Pasalagua that she no longer supported the Union. Duran also told Pasalagua that she stopped attending union meetings. Moreover, there was no evidence presented that Stern and/or Pasalagua engaged in any unusual conduct to determine the level of union support (or lack thereof) among employees. In fact, Respondent could have learned, through rumors at the facility or casually observing attendance at union meetings that support was waning for the Union. Viewing the record as a whole, the General Counsel has failed to present sufficient evidence that Respondent's knowledge of the level of union support came from anything other than ordinary observations.

However, I conclude that Respondent, through Pasalagua, created the impression of surveillance by suggesting that he knew employees were participating in the Board investigation.[76] Here, unlike the previous allegations, Pasalagua did something "out of the ordinary." Specifically, Pasalagua took the unusual step of reading the Union's ULP charge(s) to employees, and in so doing, he learned which employees would likely be interviewed by the Board during its investigation. Not only that, as stated previously in this decision, he queried employees about their participation in the Board's investigation. In light of the circumstances as a whole, I find that Pasalagua's conduct constituted more than "mere observation," but "represented unusual behavior" on his part that would reasonably lead Juarez (and others) to conclude that their Union activities were under surveillance.

Respondent, through Pasalagua, also created the impression of surveillance when he told Mancera he was "riling up employees."[77] Specifically, as stated I previously, I find Pasalagua's statement particularly troubling considering the timing, location and context of when the statement occurred. Moreover, Pasalagua is an agent acting on behalf of Stern himself whose sole purpose is to convince employees to vote against the Union. More importantly, Pasalagua had no legitimate reason to question Mancera about his alleged conduct with his fellow employees. In fact, the evidence supports that Mancera was not riling up anyone. Even if Pasalagua heard through rumor or casually observed Mancera "riling up employees," in this case, Pasalagua did something more. In fact, after Mancera denied Pasalagua's accucations, Pasalagua told Mancera that he may lose a promotion opportunity if he refused to calm down his rhetoric. Moreover, even after Mancera denied Pasalagua's accusations a second time and demanded to know where Pasalagua learned about the rumors concerning him, Pasalagua refused to respond. Viewing the totality of the circumstances, Pasalagua's actions represented something "out of the ordinary" which would reasonably leave Mancera (or anyone else) with the impression that his Union activities were under surveillance. Accordingly, I conclude that Respondent violated the Act as alleged in paragraph 5(u)(i) of the complaint.

C. The Section 8(a)(1) *Threatening Employees for Engaging in Union Activities Violations*

The General Counsel next asserts that Respondent, by Pasalagua and Penn, violated the Act by threatening employees in various ways for engaging in union activities.

In assessing whether a remark constitutes a threat, the appropriate test is "whether the remark can reasonably be interpreted by the employee as a threat."[78] The actual intent of the speaker or the effect on the listener is immaterial.[79] The "threat in question need not be explicit if the language used by the employer or his representative can reasonably be construed as threatening."[80] The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement as a veiled threat to coerce.[81]

Determining whether an ambiguous statement is an illegal threat versus an opinion about the possible consequences of unionization has proven difficult. The U.S. Supreme Court described the balance between the employer's free speech rights as codified by Section 8(c) of the Act and employee's Section 7 rights in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). In *Gissel*, the Court stated:

> It is well settled that an employer is free to communicate to his employees any of [its] general views about unionism or any of [its] specific views about a particular union so long as the communications do not contain a "threat of reprisal or force or promise of benefit." [The employer] may even make a prediction as to the precise effect [it] believes unionization will have on the company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond [its] control.[82]

An employer need not remain neutral during a union campaign, and Section 8(c) permits the employer to campaign

[74] See Consol. Compl. ¶5(h).
[75] See GC 1(i) at ¶5(i)(ii).
[76] See GC Exh. 1(i) at ¶5(r)(ii).
[77] See GC Exh. 1(l) at ¶5(u)(i).
[78] *Smithers Tire & Automotive Testing of Texas*, 308 NLRB 72 (1992).
[79] Id.; see also *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981) (inquiry under Sec. 8(a)(1) is an objective one which examines whether the employer's actions would tend to coerce a reasonable employee).
[80] *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970).
[81] *KSM Industries*, 336 NLRB 133, 133 (2001).
[82] See also *National Propane Partners, L.P.*, 337 NLRB 1006, 1017 (2002).

against the union and present an alternate view, ensuring that employees are fully informed about their choice.[83] However, employers must present their view without threatening employees. As the Court noted in *Gissel*, "the Board has often found that employees, who are particularly sensitive to rumors of plant closings, take such hints as coercive threats rather than honest forecasts."[84] In balancing these competing interests, the Board has held that threats of job loss or loss of hours in retaliation for engaging in union activities violate Section 8(a)(1) of the Act.[85] Likewise, threats not to promote employees due to their protected activities also violate the Act.[86]

1. Threats of sale, closure or bankruptcy

In complaint paragraphs 5(c)(i) and (d)(i), the General Counsel asserts that Respondent, through Pasalagua, in various small group meetings, threatened drivers Pacheco, Loc, and/or Beltran by telling them, during an organizing campaign, that Respondent could sell/close its business which would cause employees to lose their jobs. Complaint paragraph 5(o)(i) alleges that, during another small group meeting in the midst of the organizing drive, Pasalagua threatened driver Juarez that Respondent may go bankrupt. Based on the credited evidence, I agree with counsel for the General Counsel that, by stating, on the eve of the election and without any objective evidence, that Stern could sell/close the facility, Pasalagua's obvious implication was that Pacheo's, Loc's, and/or Beltran's support for the Union would result in negative consequences.

Similarly, Pasalagua's comment to Juarez, on the eve of the union election, that companies that had unions do not retain contracts and, therefore, go bankrupt, implies, without any objective factual basis for his statement, that such a scenario would happen to Respondent if Juarez voted for the Union. Unlike cases where the Board held that Respondent's statements could be construed as "predictions" about the effects of unionization, in Pasalagua's case, his "predictions" were not based on objective facts from previous strikes or bankruptcies to which he was involved. Rather, Pasalagua's remarks would reasonably lead an employee to conclude that strikes and/or Respondent's bankruptcy are inevitable if employees supported the union.[87] Clearly, the Supreme Court found such statements that equate union activities to bankruptcies and/or facility closings amount to unlawful threats.[88] Accordingly, I conclude that Respondent violated Section 8(a)(1) of the Act as alleged in the complaint.

2. Threats of strike or lockout

Similarly, I find that Respondent, via Penn, violated the Act when she told employees, in a recorded statement during a large group meeting that if the Union rejected Respondent's final offer, a strike vote "will be taken," and . . . if employees voted to strike, Stern could use his leverage and "lock the door on all of you . . . to make sure the Union agrees to his terms." Again, Penn's statements are devoid of objective facts based upon specific past strike experiences. Rather, she conveyed to employees that strikes are inevitable, and as such, the Board has found such statements unlawful.[89] Accordingly, Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 5(b)(ii) of the complaint.

3. Threats of loss of benefits and hours

In complaint paragraph 5(b)(iii), the General Counsel argues that Respondent, through Penn, violated the Act when, during a large group meeting, she impliedly threatened employees with a loss of benefits by saying, "Look at all the stuff he has done for many of you in here. Many of you were given a second chance by him at one point or another—you've gone to him and asked for loans, asked for him to change your schedule . . . now he is going to be in a situation where he is going to bargain tough against you." In reviewing the record, I agree with counsel for the General Counsel as the Board has found these types of statements unlawful.[90]

Similarly, I find that Respondent, via Pasalagua, violated the Act when he threatened Pacheco and others by stating that if the Union came onboard, Stern could reduce employees' work hours in order to be able to give them a raise. Specifically, the credited evidence shows that, in threatening Pacheco with reduced work hours if employees voted for the Union, particularly given that the discussion was held in a small conference room with few employees present, Pasalagua's obvious implication was that Pacheco's support for the Union would result in negative consequences. The Board has found that these types of statements amount to unlawful threats. Accordingly, Respondent violated the Act as alleged in complaint paragraph 5(g).

I also find that Respondent violated the Act when Pasalagua told Mancera and several other night shift employees about their inability to talk/deal with Stern directly if they unionized.[91] While Pasalagua's statement is an accurate "prediction as to the precise effect . . . unionization will have"[92] on Respondent, vis-

[83] See, e.g., *Steam Press Holdings, Inc. v. Hawaii Teamsters*, 302 F.3d 998 (9th Cir. 2002).

[84] *Gissel*, supra at 619–620 (footnotes omitted).

[85] *United/Bender Exposition Service*, 293 NLRB 728, 732 (1989); *Middletown Hospital Assn.*, 282 NLRB 541 (1986); *Air Express International*, 281 NLRB 932 (1986); *Fiber Glass Systems*, 278 NLRB 1255 (1986); *Foundation of California State University*, 255 NLRB 202 (1981); *Louis Gallet, Inc.*, 247 NLRB 63, 63 at fn. 1 (1980).

[86] *QSI, Inc.*, 346 NLRB 1117, 1118 (2006); *Hospital Shared Services, Inc*., 330 NLRB 317, 318 (1999); *Prudential Insurance Co. of America*, 317 NLRB 357 (1995); *Marmon Transmotive*, 219 NLRB 102, 113–114 (1975); *Ford Motor Co*., 251 NLRB 413, 422 (1980).

[87] See *Stanadyne Automotive Corp*., 345 NLRB 85, 89–90 (2005) (employer did not violate the Act when it told employees that, hypothetically, if the parties' negotiations resulted in an impasse, based upon previous union strikes, the effects of unionizing could result in the possibility of union strikes); Cf AP Automotive Systems, Inc., 333 NLRB 581 (2001) (employer violated the Act where its speech conveyed only the inevitability of a strike by stating: "the scenario . . . [that] the [union] would inevitably make exorbitant demands, . . . the [e]mployer would not agree to these demands, a strike would ensue, and the plant would close.").

[88] *Gissel*, supra at 619–620 (footnotes omitted).

[89] *AP Automotive Systems, Inc*., supra, *Gold Kist, Inc.*, 341 NLRB 1040, 1040–1042 (2004).

[90] See *Reeves Bros., Inc*., 320 NLRB 1082, 1083 (threats made in a captive audience meeting to reduce hours amounted to an unlawful veiled threat of repercussions if employees selected the union).

[91] GC Exh. 1(i) at ¶5(k).

[92] *Gissel*, supra at 619.

à-vis—employees would have to negotiate with Stern through their union versus directly with Stern—I nevertheless agree with counsel for the General Counsel's argument that employees hearing Pasalagua's comment, made after numerous other coercive statements to employees on the eve of the scheduled election, would reasonably believe that he was impliedly threatening them that if employees unionize, they will give up the benefit of dealing directly with Stern.

The credited testimony also reveals that Pasalagua threatened Pacheco, his coworkers, and Beltran when Pasalagua told them that that they would be fined and given jail time if they testified untruthfully during the Board investigation. Clearly, Pasalagua's communications had no basis in fact and was not carefully phrased . . . "to convey an employer's belief as to demonstrably probable consequences beyond [its] control."[93] Rather, I find his comments tantamount to a threat of reprisal (i.e., fines and jail time) if employees exercise their Section 7 rights (i.e., participate in the Board's investigation of the Union's ULP charges against Respondent). Accordingly, Respondent violated the Act as alleged in complaint paragraphs 5(k), (s)(i) and 5(t).

In complaint paragraph 5(l), the General Counsel alleges that Respondent threatened employees that it would engage in dilatory bargaining tactics when Pasalagua purportedly told Beltran and his coworkers that Stern "would have the last word" in bargaining. Although counsel for the General Counsel primarily relied on Beltran's testimony concerning this incident, I did not find him credible. Moreover, Chacon and Duran, whom Beltran claimed were present in all of his meetings with Pasalagua, never corroborated Beltran's account of Pasalagua's statements. Without credible, corroborating evidence, I do not believe Pasalagua made the remarks Beltran attributed to him.

Nor do I find Pasalagua's remark that Mancera should "calm down" from riling up employees because Stern was considering him for a supervisor position constitutes an unlawful threat. Rather, this allegation is more appropriately analyzed under the theory that Respondent promised employees increased benefits and/or improved working conditions. Therefore, Respondent did not violate the Act as alleged; and accordingly, I dismiss paragraphs 5(l) and 5(u)(iii) of the complaint.

D. Promised Employees Increased Benefits and Improved Terms and Conditions of Employment

The General Counsel next argues that Respondent, through Pasalagua, during several separate small group meetings, made promises of increased benefits, wages, and/or other unspecified benefits to employees in violation of Section 8(a)(1). Pasalagua and Stern are also alleged to have made further promises to provide employees with jackets and other unspecified improved benefits on the eve of the scheduled election. After reviewing all of the evidence of record, I find that the General Counsel has proven the allegations alleged.

The Supreme Court, in *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944), stated that the "action of employees with respect to the choice of their bargaining agents may not be induced by favors bestowed by the employer as well as by his threats or domination." As the Court explained in *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964):

> [t]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.[94]

As such, the Court held that that "the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union," interferes with the employees' protected right to organize.[95] This rule applies both when an election is imminent as well as during an organizational campaign before a representation petition has been filed.[96]

To avoid liability then, an employer that grants wage increases or other benefits during the pendency of an election petition must prove that the increase or benefit was planned prior to the time the union activity began, or that they were part of an established past practice.[97] If the announcement of a benefit is timed to influence an election's outcome, the Board may find a violation of the Act even where the benefit had previously been planned. Although employers' purported promise is often indirect, ambiguous and must be inferred, "the fact that an employer couches the promises of benefits in language that does not guarantee anything specific does not remove the taint of illegality."[98]

Complaint paragraphs 5(a)(ii) and (iii) allege that Respondent, via Pasalagua, promised Ruiz that Stern would fix his problems with his workers compensation payments in an attempt to entice him to vote against the Union. Based upon a review of the record, I conclude that the complaint allegations are supported by the record. Specifically, I find the timing of Pasalagua's statement, during a one-on-one meeting with Ruiz on the eve of a scheduled election, highly suspect. Additionally, there was no evidence adduced by Respondent that Pasalagua or Stern were previously aware of Ruiz' workers compensation issue (in fact Stern denied knowing anything about it) or had previously told Ruiz they would "fix" his issue. Under the circumstances presented here, I find Pasalagua's comment constituted an implied promise of benefit because he inferred that Ruiz's workers compensation payments would be taken care of if he supported Stern and voted against unionization.

Similarly, I conclude that Pasalagua unlawfully promised increased wages and improved benefits during his small group meeting with Pacheco. Specifically, the credited evidence supports Pasalagua's statements that he told Pacheco, on the eve of the scheduled election, that he would improve salaries, insurance and drivers' positions if Pacheco and others gave Stern a vote of confidence. In fact, the evidence reveals that Pasalagua

[93] Id.

[94] *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

[95] Id.

[96] See, e.g., *Curwood Inc.*, 339 NLRB 1137, 1147–1148 (2003), enfd. in pertinent part 397 F.3d 548, 553–554 (7th Cir. 2005) (prepetition announcement and promise to improve pension benefits in reaction to knowledge of union activity among its employees violated Sec. 8(a)(1)).

[97] *NLRB v. Exchange Parts Co.*, supra; *Baltimore Catering Co.*, 148 NLRB 970 (1964).

[98] *Superior Emerald Park Landfill, LLC.,* 340 NLRB 459, 460 (2003).

explicitly linked his promise of wage increases to employees voting against the Union. The Board has held such implied promises of benefits tied to an upcoming election unlawful.[99]

In addition, Pasalagua and Stern unlawfully promised Rosas and Ruiz wage increases and better working conditions if they voted against the Union. Specifically, the evidence clearly demonstrates that, during a small group meeting with Rosas and Ruiz, Stern told the men that he wanted the opportunity for the Union not to come onboard and immediately thereafter, told them that "things were going to change." Such a link between the implied promise itself, the timing of the promise (occurring on the eve of the scheduled election) and a request for a vote of confidence [and against unionization] makes Stern's statements unlawful. Other than Respondent's denial that the conversation occurred (which I found not credible), I find no legitimate business justification for the timing of Stern's statements; nor do I find any evidence that such a beniefit was previously planned. Accordingly, I conclude Respondent violated the Act as alleged in complaint paragraphs 5(e) and (m).

Pasalagua and Stern also impliedly promised Mancera and others that they would provide drivers with jackets and other unspecified benefits if employees voted against the Union.

The Board found a similar promise to give equipment and resources to employees during an organizing campaign unlawful in *Superior Emerald Park Landfill,* 340 NLRB 459, 460 (2003). In that case, the supervisor, who held three impromptu small meetings with two employees during an organizing campaign, told the employees that he would "make [the] necessary changes to make it a better place to work," "try to obtain more equipment and staff," and offered to do "whatever" he could to address issues involving the "equipment, personnel, needs, changes in the company [and] changes in the economy." Significantly, during these particular meetings, the supervisor stressed to the employees that "now is the time to bring some of those questions out."

The Board, in adopting the administrative law judge's (ALJ or judge) findings, found an implicit link between the supervisor's repeated promises to try to obtain more equipment and staff and the upcoming election. In so doing, the Board, agreeing with the ALJ's findings, determined that the supervisor's remarks "could not have been clearer in suggesting the linkage between the upcoming election and management's desire to improve employees' working conditions." Ultimately, the Board concluded the supervisor's statements unlawful.

Like in *Superior Emerald Park Landfill*, in this case, the credited evidence first demonstrates that Stern linked his request for a "vote of confidence" to improving conditions at the facility. The Board found such statements unlawful.[100] Second, immediately after Mancera reminded Stern about his previous request for company jackets, Stern agreed to provide them. Moreover, the timing of the promise—occurring during a one-on-one meeting with Mancera, on the eve of the scheduled election—is highly suspicious especially after Stern asked Mancera for a "vote of confidence." While Respondent denied that the incident occurred, the evidence demonstrates otherwise. I find no evidence that Respondent had a legitimate business reason for the timing of Stern's promises; and as such, Respondent violated the Act as alleged in complaint paragraph 5(j)(ii).

Lastly, I conclude that Pasalagua impliedly promised Mancera a promotion if he stopped engaging in protected concerted union activities. Specifically, the record reveals that Pasalagua told Mancera that if he "calm[ed] down" from riling up employees, he was in line for a supervisory position. Even though Mancera denied riling up anyone, the clear implication of Pasalagua's statement is if Mancera refrained from engaging in protected union activities, he would be considered for promotion. Moreover, the timing of Pasalagua's statement—occurring just days before the scheduled election—infers an improper motive. Having found no evidence to justify the timing of Pasalagua's statement, Respondent violated the Act since any employee in Mancera's position would reasonably conclude that they are being promised a benefit (i.e., promotion) if they do not engage in union activities. Therefore, I sustain the complaint allegations in paragraph 5(u)(ii).

E. Granted Employees Benefits

1. Respondent's open door policy

Complaint paragraph 5(f) contends that Respondent, through Pasalagua and Stern, granted employees benefits when it implemented a previously unenforced open-door policy that provided direct access to Stern. However, the record reveals otherwise.

Rather, the credited evidence demonstrates that Respondent maintained an open door practice/policy prior to the scheduled election which allowed employees to discuss any issue, whether personal or work related, directly with Stern. Stern's uncontroverted testimony confirmed that, before and after the election petition was filed, employees approached Stern about various issues and often voiced their concerns about their terms and conditions of employment. Although counsel for the General Counsel relied on employees' testimony that they had never *heard* of the policy prior to the organizing campaign, the evidence demonstrates that they nevertheless *utilized* the policy before and during the union campaign.

To further prove that Stern implemented the unenforced open-door policy to coincide with the Union's organizing campaign, the General Counsel argued that Stern was hardly available at the facility prior to the organizing campaign but was present onsite almost daily during the campaign. However, I credit Stern's testimony explaining his prior unavailability, which had nothing whatever to do with the Union or the organizing campaign.

The fact of the matter is that Respondent continued to implement its open door policy despite the election petition and organizing campaign; and as such, did not violate the Act by granting

[99] See *NLRB v. Exchange Parts Co.,* supra.

[100] See *Reno Hilton*, 319 NLRB 1154, 1156 (1995) (supervisor's request for a chance to "deliver," taken in the context of his earlier references to benefits already bestowed, and in the broader context of the Respondent's unlawful promises of benefits, grants of benefits, and implied promises to remedy grievances, violates Sec. 8(a)(1) since such statements would be interpreted by reasonable employees as an implied promise "either to grant additional benefits or to remedy employees' grievances, or both.").

a previously unenforced benefit to employees.[101]

2. Respondent's gift card program

Similarly, I conclude that Respondent did not violate the Act by granting restaurant gift cards to employees who received 100 percent ratings on their DOT inspections.[102] Here, the General Counsel relies on the testimony of driver Loc who confirmed that, prior to the union's organizing campaign he had never received any reward for perfect ratings on his DOT inspections. However, the General Counsel's reliance on employee testimony is misplaced.

Rather, the credited and documentary evidence shows that Leese began the gift card program long before the election petition was filed to reward drivers for receiving perfect ratings on their DOT inspections while meeting Respondent's time targets to deliver produce. The program was in place before and during the organizing campaign. Although Loc may not have received a reward prior to the election petition, the documentary evidence proves that the start of the program had nothing to do with the Union, the election petition or the organizing campaign. Respondent thereby did not grant benefits to employees as a result of the organization campaign or employees protected concerted union activities. Therefore, I dismiss complaint paragraphs 5(f) and (n).

F. Informed Employees That It Would be Futile for Them to Select the Union

Complaint paragraphs 5(c)(ii), (d)(ii), and (o)(ii) all contend that Respondent, through statements made by Pasalagua, threatened employees that it would be futile for them to select the Union.

With respect to the allegations that Pasalagua told Pacheco (and others) that Respondent would reduce employees work hours if the union came on board and that Stern could give employees a "penny increase" since Stern ultimately had the last word (paragraph 5(c)(ii)), I do not find a separate violation here as I previously analyzed (and sustained) this allegation as an unlawful threat of reprisal.[103]

In addition, I do not find that Respondent violated the Act with respect to statements Beltran attributed to Pasalagua because I have previously found Beltran's testimony uncorroborated and incredible. Again, this contention formed the basis of an allegation which I previously analyzed and dismissed as a threat of reprisal. Accordingly, I dismiss complaint paragraphs 5(c)(ii) and (d)(ii) respectively.

However, I conclude that Respondent, through Pasalagua, essentially informed Loc that it would be futile for him to select the Union when he told Loc that it would be better if all employees got together and spoke directly with Stern about their concerns since, in the end, Stern would have the last word. Although ordinarily, such a statement would not be found unlawful,[104] given the context in which Pasalagua made his remarks, it is clear that any employees in Loc's position would reasonably believe that selecting the Union would not benefit them since Stern ultimately made the final decision. Absent any other evidence to justify the the timing of the statement, I find that Pasalagua's remark violated the Act as alleged in complaint paragraph 5(o)(ii).

Lastly, the General Counsel raised questions about Respondent's anti-union sentiment found in its flyers distributed to employees and posted throughout the facility. However, counsel does not clearly delineate a specific allegation regarding these flyers. To the extent that counsel asserts that, Respondent, in its flyers, threatened its employees by conveying that selecting the Union would be futile,[105] counsel offered no argument in support of this allegation.[106]

G. Blamed the Union and Misrepresented its Actions

In complaint paragraph 5(v), the General Counsel essentially alleges that Respondent threatened employees when it blamed the Union for preventing Stern from making changes to employees' terms and conditions of employment. Counsel further asserts that Respondent threatened employees by telling them that the Union would file ULP charges against Stern if it increased employees' wages during the organizing campaign. However, counsel's arguments are not supported by the record.

In reaching this conclusion, I considered Respondent's statement in the context of what was happening during the organizing campaign as a whole, looking at the overarching message being conveyed to employees.

Using that standard, the documentary evidence clearly shows that Stern issued the July 8, 2016 letter to employees in response to a previous letter from the Union and in an attempt to debunk rumors (raised by the Union) that employees would receive a wage increase and to explain Respondent's legal obligations to maintain the status quo under the Act. Nothing in the record suggests that this letter threatened employees in any way. I can only surmise that the General Counsel's position is that it is a ULP violation for Respondent to address false rumors and state its legal obligations under the Act during a union organizing drive. Such an allegation is ridiculous; and I find no evidence that Respondent's letter violated the Act in any way. Accordingly, I dismiss the allegations contained in complaint paragraph 5(v).

H. Interfered with the Board's Process and Investigation

Lastly, the General Counsel asserts that Respondent, via Pasalagua, violated the Act by discouraging employees from

[101] *NLRB v. Exchange Parts Co.*, supra; see also *Baltimore Catering Co.,* 148 NLRB 970 (1964).

[102] See GC Exh. 1(i) at ¶5(n).

[103] This same incident forms the basis for complaint par. 5(g). See GC 1(i) at ¶5g. Counsel for the General Counsel attempts to double dip with the foregoing allegation as it did with complaint allegation 5(u)(ii) involving Pasalagua's statements to Mancera. In essence, counsel purports to use the same incident to support two 8(a)(1) threat of reprisal violations. In my view, there's only one, which I previously analyzed and sustained. I cannot imagine any other reason for such duplicity other than that the General Counsel is trying to take several bites from the same apple in an effort to support a *Gissel* remedy. I caution counsel from continuing this tactic going forward.

[104] See *Tri-Cast, Inc*., 274 NLRB 377 (1985) (employer's statement to employees that they would no longer be able to bring complaints directly to management if they selected a Union found lawful); see also *Office Depot*, 330 NLRB 640, 642 (2000).

[105] See GC Exh. Br. at 54; see also GC Exh. 15.

[106] See GC Exh. 1(i).

participating and/or interfering with employees' ability to participate in the Board's investigation of the Union's ULP charges. I agree.

It is well settled that participating in the Board's processes of filing ULP charges, regardless of whether they are ultimately meritorious, is concerted protected activity.[107] Giving testimony to the Board is also protected.[108] As such, threatening to retaliate against employees because they participated in the Board's processes is also a threat of reprisal and violative of the Act.[109] Similarly, statements intended to hinder or discourage an employee from participating in the Board's investigation of ULP charges violates the Act.[110]

In complaint paragraph 5(q), the General Counsel asserts that Respondent, through Pasalagua, discouraged Mancera from participating in the Board's investigation when, after showing Mancera the Union's ULP charges, Pasalagua told Mancera that he could not help employees with work orders so long as Respondent was responding to the Union's charges. However, the record reveals otherwise. In fact, Mancera testified that Pasalagua told him that some employees filed charges concerning work orders being taken away from them, then Pasalagua stated that Respondent would have to wait until the investigation concluded.[111] Counsel failed to establish how these statements discouraged or hindered Mancera or others from participating in the Board's investigation of the Union's ULP charges. Therefore, I do not find sufficient evidence to conclude that Respondent violated the Act as alleged, and I dismiss the allegations in the aforementioned paragraph.

However, the record clearly supports that Pasalagua repeatedly tried to discourage, hinder and interfere with employees' right to participate in the Board's investigation. Specifically, I find credible evidence that, after showing Juarez the Union's ULP charges, Pasalagua told Juarez that he did not need to answer the Board's questions since the Board would ask him the same questions as Respondent.[112] I find no other implication for this statement other than to try to discourage Juarez from participating in the Board's investigation.

I also find that Pasalagua told several employees that they would be lying if they gave testimony about the Union's charges to the Board and would be fined and jailed for giving false testimony. On its face alone, Pasalagua's remark is intended to discourage employees from giving testimony to the Board.[113] Accordingly, by attempting to discourage employees from participating in the Board's investigation, Respondent violated Section 8(a)(1) of the Act as alleged in complaint paragraphs 5(r)(iii) and (s)(ii).

I. BARGAINING ORDER

The General Counsel requests, given the numerous egregious violations committed by Respondent, that I issue a remedial bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (also known as a *Gissel* bargaining order).

The Board has broad discretion to fashion a just remedy to fit the circumstances of each case it confronts.[114] The Supreme Court has interpreted Section 10(c) as vesting the Board with discretion to devise remedies that effectuate the policies of the Act.[115]

Under *Gissel*, the Board will issue a remedial bargaining order, absent an election, in two categories of cases. The first category is "exceptional" cases, those marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase the coercive effects, thus rendering a fair election impossible.[116]

The second category involves "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine the majority strength and impede election processes."[117] In the latter category of cases, a *Gissel* bargaining order may be best if, on balance, the possibility of erasing the effects of the past unfair labor practices, by using traditional remedies is slight and employee sentiment would be better protected by the order.[118]

In determining the propriety of a bargaining order, the Board examines the seriousness of the violations and the pervasive nature of the conduct, considering such factors as the number of employees directly affected by the violations, the size of the unit, the extent of the dissemination among employees, and the identity and position of the individuals committing the unfair labor practices.[119] A *Gissel* order, however, is an extraordinary remedy. The preferred route is to order traditional remedies for the unfair labor practices and to hold an election, once the atmosphere has been cleansed by the remedies ordered. *Hialeah Hospital*, 343 NLRB 391, 395 (2004) (citing *Aqua Cool,* 332 NLRB

[107] See *Anheuser-Busch, Inc.*, 337 NLRB 3, 15 (2001) (unlawful threats of retaliation for filing charges with Board violate Act), enfd. 338 F.3d 267 (4th Cir. 2003); see also *Braun Electric Co.,* 324 NLRB 1 (1997), citing, *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731, 740 (1983), and *Roadway Express,* 239 NLRB 653 (1978) ("there can be no doubt that [filing charges] was protected by the Act.").

[108] *Equitable Gas Co.,* 303 NLRB 925, 936 (1991) (finding violation of Sec. 8(a)(1) where threatening statements were premised on filing ULP charges and giving supporting testimony under the Act").

[109] See, e.g., *Armstrong Rubber Co.,* 273 NLRB 233, 235 (1984); *Donahue Beverages, Inc.,* 1999 NLRB 681, 583 (1972).

[110] *Management Consultant Inc. (MANCON)*, 349 NLRB 249, 250 (2007); see also *Certain-Teed Products Corp*., 147 NLRB 1517, 1519–1521 (1964) (employer's advice to employees that they need not cooperate with Board agents in unfair labor practice investigations violated Sec. 8(a)(1) where advice was designed to and would discourage employees from providing information and hinder investigation of unfair labor practice charges).

[111] Tr. 177.

[112] *MANCON*, supra at 249 ("an instruction, admonition, or warning to an employee, express or implied, not to get involved in activities protected by the Act interferes with, restrains, and coerces employees in the exercise of their rights under the Act.").

[113] See *Novelis Corp.*, 363 NLRB No. 101, fn. 9 (2016).

[114] *Maramont Corp.*, 317 NLRB 1035, 1037 (1995).

[115] *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898–899 (1984).

[116] *Gissel,* supra.

[117] Id. at 614.

[118] Id.

[119] See *Intermet Stevensville*, 350 NLRB 1270 (2007) citing *Abramson, LLC*, 345 NLRB 171, 176 (2005) (citing *Garvey Marine, Inc.,* 328 NLRB 991, 993 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001)). Accord *Holly Farms Corp.,* 311 NLRB 273, 281 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), cert. denied in pertinent part 516 U.S. 963 (1995).

95, 97 (2000)).

After carefully reviewing the violations found herein, I find that the General Counsel has met its burden to prove that a *Gissel* bargaining order is appropriate under the circumstances.

The purpose of a remedial bargaining order is "to remedy past election damage [and] deter future misconduct."[120] The Supreme Court had sanctioned the issuance of such a bargaining order "where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined the union's majority. . . ."[121] Thus, the Board has the authority to order an employer to recognize and bargain with a union even if the employees have not voted for union representation in an election.

Using the aforementioned standards, I find that this case falls squarely within Category I. The pervasiveness of the unfair labor practices is described fully above and need not be reiterated here. The unfair labor practices included highly coercive hallmark violations such as threats of job loss, layoffs, and facility closure, as well as threats of bankruptcy, mass strikes, and lock outs.

Moreover, the unfair labor practices continued over several months on the eve of the scheduled election. The threat of facility closures and lock outs came from Respondent's agents, speaking on behalf of the owner, during small one-on-one meetings as well as during captive-audience meetings with each and every employee. "Neither the threat nor the mass layoff is likely to be forgotten by the employees. To the contrary, these are the types of dire warnings and concrete measures certain to exert a substantial and continuing coercive impact on any employee, whether current or subsequently hired, contemplating a vote in favor of unionization."[122]

Respondent also committed other unfair labor practices that made it clear to the employees that their support and/or vote for the Union would have a negative effect on their employment. Those violations included holding small one-on-one and large group meetings where Respondent's consultants gave employees the impression that their concerted activity was under surveillance, repeatedly making statements that it was futile for employees to support the Union, threatening employees with a loss of benefits and reduced work hours, promising employees improved working conditions, equipment and other resources if they voted against the Union, and telling employees that Respondent would engage in dilatory bargaining if they voted to unionize. These violations reinforced the coercive atmosphere created by the "hallmark" threats of job loss, layoffs, facility closure, and/or bankruptcy.

Although I did not find violations on every allegation in the complaint, for those violations I do find, I conclude that they are sufficiently severe and persuasive hallmark violations that, coupled with the other violations, have tainted the environment to such an extent that a fair, impartial election is impossible. I find, therefore, that a bargaining order is warranted under Category I.[123]

[120] *Gissel*, supra.

[121] *Gissel*, supra at 610; see also *NLRB v. Katz*, 369 U.S. 736, 748 (1962).

[122] See *Weldun International*, 321 NLRB 733, 734, and 748 (1996), enfd. mem. in relevant part 165 F.3d 28 (6th Cir. 1998).

CONCLUSIONS OF LAW

1. Respondent Stern Produce Company, Inc. is an employer within the meaning of Section 2(6) and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by interrogating employees Roberto Rosas and Jose Ruiz about their union membership, activities, and/or sympathies.

3. Respondent violated Section 8(a)(1) of the Act by interrogating employees Juan Juarez and Jose Pacheco about their participation in the Board's investigation of the Union's ULP charges.

4. Respondent violated Section 8(a)(1) of the Act by creating an impression that employees' union activities were under surveillance by suggesting that Respondent knew which employees were participating in the Board's investigation of the Union's ULP charges.

5. Respondent violated Section 8(a)(1) of the Act by threatening employees Jose Pacheco, Jose Loc, and Gasper Beltran that the owner would sell his business and/or close the facility if employees supported the Union.

6. Respondent violated Section 8(a)(1) of the Act by threatening employee Juan Juarez that the owner may go bankrupt if employees supported the Union.

7. Respondent violated Section 8(a)(1) of the Act by threatening employees that the owner will force a strike or lock out if employees supported the Union.

8. Respondent violated Section 8(a)(1) of the Act by threatening Jose Pacheco and other employees with unspecified reprisals and a loss of benefits and work hours if employees supported the Union.

9. Respondent violated Section 8(a)(1) of the Act by making threatening statements to Eduardo Mancera and other employees that they would be unable to talk to or deal/negotiate directly with the owner if employees unionized.

10. Respondent violated Section 8(a)(1) of the Act by threatening Jose Pacheco, Gasper Beltran, and other employees that they would be fined and given jail time if they testified untruthfully during the Board's investigation of the Union's ULP charges.

11. Respondent violated Section 8(a)(1) of the Act by promising employees increased wages, benefits, equipment and/or improved terms and conditions of employment if the Union lost the election.

12. Respondent violated Section 8(a)(1) of the Act by promising employee Eduardo Mancera that Respondent would provide equipment and other unspecified benefits to employees if the Union lost the election.

13. Respondent violated Section 8(a)(1) of the Act by giving employee Jose Loc the impression that it would be futile for them to vote for the Union.

14. Respondent violated Section 8(a)(1) of the Act by discouraging employee Juan Juarez from testifying in the Board's investigation of the Union's ULP charges.

[123] *Electro-Voice, Inc*., 320 NLRB 1094 (1996). Since the General Counsel satisfied the standards for a *Gissel* order under Category I, I do not reach the question of whether the case satisfies the standards for a bargaining order under Category II—that being whether Respondent's ULP violations undermined the Union's support.

15. By the conduct described above, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

16. By the conduct described above, Respondent has failed to recognize and bargain in good faith with the Union.

17. Accordingly, Respondent has violated Sections 8(a)(5) and (1) of the Act.

18. Respondent did not otherwise engage in any other unfair labor practices alleged in the consolidated complaint in violation of the Act.

REMEDY

Having found that Respondent engaged in several unfair labor practices, I find Respondent must be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having interrogated employees Jose Ruiz and Roberto Rosas about their union membership, activities, and/or sympathies, Respondent is ordered to cease and desist from this action and interrogating any other employee about his/her union membership, activities, and/or sympathies.

Having interrogated employees Juan Juarez and Jose Pacheco about their participation in the Board's investigation of the Union's ULP charges, Respondent is ordered to cease and desist from this action and interrogating any other employees about their protected concerted activity.

Having created an impression that employees' union activities were under surveillance by suggesting that Respondent knew which employees were participating the Board's investigation of the Union's ULP charges, Respondent is ordered to cease and desist from this action.

Having threatened employees Jose Pacheco, Jose Loc, and Gasper Beltran that the owner would sell his business and/or close the facility if employees supported the Union, Respondent is ordered to cease and desist from this action and threatening any other employee in this regard.

Having threatened employee Juan Juarez that the owner may go bankrupt if employees supported the Union, Respondent is ordered to cease and desist from this action and threatening any other employee in this regard.

Having threatened employees that the owner will force a strike or lockout if employees supported the Union, Respondent is ordered to cease and desist from this action.

Having threatened employee Jose Pacheco and other employees with a loss of benefits, reduced work hours and other unspecified reprisals if employees supported the Union, Respondent is ordered to cease and desist from this action.

Having made threatening statements to employee Eduardo Mancera and other employees that they would be unable to talk to or deal/negotiate directly with the owner if employees unionized, Respondent is ordered to cease and desist from this action.

Having threatened Jose Pacheco, Gasper Beltran, and other employees that they would be fined and given jail time if they testified untruthfully during the Board's investigation of the Union's ULP charges, Respondent is ordered to cease and desist from this action.

Having made implied promises to employees of increased wages and other improved terms and conditions of employment if the Union lost the election, Respondent is ordered to cease and desist from this action.

Having made implied promises to employee Eduardo Mancera that Respondent would provide employees with equipment and/or other resources if the Union lost the election, Respondent will be ordered to cease and desist from this action.

Having given employee Jose Loc the impression that it would be futile for him and his coworkers to vote for the Union, Respondent is ordered to cease and desist from this action.

Having discouraged employee Juan Juarez from testifying in the Board's investigation of the Union's ULP charges, Respondent is ordered to cease and desist from this action and discouraging any other employee in this regard.

In light of my finding above that a *Gissel* bargaining-order is appropriate, the Respondent is ordered to, on request, bargain with the Local 99 of the United Food and Commercial Workers Union as the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment.

I will order that Respondent post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11, 15–16 (2010). The notice will be posted in both English and Spanish. In accordance with *J. Picini Flooring*, the question as to whether an electronic notice is appropriate should be resolved at the compliance phase.[124]

In addition, the General Counsel has requested that the notice be read aloud by Stern or Pasalagua or by a Board agent in the presence of Stern or Pasalagua. The Board has required this remedy when numerous serious unfair labor practices have been were committed by high-ranking management officials.[125] In addition, when unfair labor practices are severe and widespread, having the notice read aloud to employees allows them to "fully perceive that the Respondent and its managers are bound by the requirements of the Act."[126]

I find the General Counsel has established that this remedy is necessary to enable employees to exercise their Section 7 rights free from coercion.[127] However, in light of the coercive environment created by the violations committed by Stern and/or his consultants, Respondent is ordered to have the notice read aloud by a Board agent in the presence of Stern, Pasalagua and Penn as well as the rest of Respondent's management personnel. The notice will be read in both English and Spanish, or read in English and translated in Spanish; however, the translation *shall not* be read/conducted by Pasalagua. In addition, Respondent is ordered to read the Notice in the presence of a Union representative in order that employees will be assured that they can learn about union representation and support the Union if they choose.[128]

[124] *J. Picini Flooring*, 356 NLRB 11, 13.

[125] *Allied Medical Transport, Inc*., supra at 6 fn. 9 (2014).

[126] *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), affd. 400 F.3d 920, 929–930 (D.C. Cir. 2005); see also *Homer D. Bronson Co*., 349 NLRB 512, 515 (2007).

[127] See *AC Specialists, Inc*., 359 NLRB 1401, 1404 (2013); *Jason Lopez' Planet Earth Landscape, Inc.*, 358 NLRB 383, 383 (2012).

[128] *United States Service Industries*, 319 NLRB 231, 232 (1995) (ordered notice reading in presence of union due to employer's "history of

The General Counsel has also requested that an explanation of rights under the Act should accompany the Board notice to employees. I find the General Counsel's request supported given the nature and pervasiveness of unfair labor practice violations committed by Respondent and will "undo the likely impact of the violations on . . . employees."[129]

Lastly, the General Counsel requests that the Union be granted access to non-work areas of Respondent's facility during non-work time to afford the union "an opportunity to participate in the restoration and reassurance of employee rights by engaging iin future organizational efforts, if it so chooses, in an atmosphere free of further restraint or coercion." However, I decline to order this remedy under the circumstances presented in this case.[130]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[131]

ORDER

Respondent, Stern Produce Company, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union membership, activities, and/or sympathies;

(b) Interrogating employees about their participation in the Board's investigation of ULP charges filed against Respondent;

(c) Creating an impression that employees' union activities are under surveillance by suggesting that Respondent knew which employees were participating in the Board's investigation of ULP charges against it;

(d) Making threatening statements to employees that the owner would sell his business and/or close the facility if employees supported the Union;

(e) Making threatening statements to employees that the owner may go bankrupt if employees supported the Union;

(f) Threatening employees that the owner will force a strike or lockout if employees supported the Union;

(g) Threatening employees a loss of benefits, reduced work hours, and/or other unspecified reprisals if employees supported the Union;

(h) Making threatening statements to employees that they would be unable to talk to or deal/negotiate directly with the owner if employees unionized;

(i) Threatening employees that they would be fined and given jail time if they testified untruthfully during the Board's investigation of ULP charges against it;

(j) Promising employees increased wages, benefits, equipment, and/or other improved terms and conditions of employee if the Union lost the election;

(k) Giving employees the impression that it would be futile for them to vote for the Union;

(l) Discouraging employees from testifying in the Board's investigation of ULP charges against it;

(m) Failing to recognize and bargain in good faith with the Union; and

(n) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with Local 99 of the United Food and Commercial Workers Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment

> Included: All full-time and regular part-time warehouse employees and drivers employed by Respondent at its distribution facility in Phoenix, Arizona.
>
> Excluded: All sales employees, accounting employees, office clerical employees, maintenance employees, managers, guards, and supervisors as defined by the Act.

(b) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona, copies of the attached notice marked "Appendix"[132] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2015.

(c) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to all employees by a Board agent in the presence of the owner/president, consultants Ricardo Pasalagua and Miko Penn and all other management officials employed by Respondent. The notice will be read in both English and Spanish, or read in English and translated into Spanish.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to

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pervasive illegal conduct" during organizing campaigns), enfd., 107 F.3d 923 (D.C. Cir. 1997).

[129] *Pacific Beach Hotel*, 361 NLRB 709, 714.

[130] *Excel Case Ready*, 334 NLRB 4, 5 (2001).

[131] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[132] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated: Washington, D.C. December 14, 2017

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising these rights.

WE WILL NOT interrogate you about your union membership, activities, and/or sympathies.

WE WILL NOT interrogate you about your participation in an investigation of unfair labor practice charges conducted by National Labor Relations Board.

WE WILL NOT create an impression that your union activities are under surveillance by stating or suggesting in any way that we know that you are participating in an investigation of unfair labor practice charges conducted by the National Labor Relations Board.

WE WILL NOT make threatening statements to you that we will sell the business, close the facility, and/or go bankrupt if you support the Union or otherwise exercise your Section 7 rights.

WE WILL NOT threaten to force a strike or lockout of employees if you support the Union or otherwise exercise your Section 7 rights

WE WILL NOT threaten you with a loss of benefits, reduction of work hours, or other unspecified reprisals if you support the Union or otherwise exercise your Section 7 rights.

WE WILL NOT threaten you with fines and jail time if you testify during an investigation of unfair labor practice charges conducted by the National Labor Relations Board.

WE WILL NOT promise you increased wages, benefits, equipment, and/or other improved terms and conditions of employment for engaging in union or other protected concerted activity.

WE WILL NOT give you the impression that it would be futile to support the Union or otherwise exercise your Section 7 rights.

WE WILL NOT discourage you from testifying in an investigation of unfair labor practice charges conducted by National Labor Relations Board.

WE WILL on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

Included: All full-time and regular part-time warehouse employees and drivers employed by Respondent at its distribution facility in Phoenix, Arizona.

Excluded: All sales employees, accounting employees, office clerical employees, maintenance employees, managers, guards, and supervisors as defined by the Act.

STERN PRODUCE COMPANY, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-163215 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.